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A DIGEST OF THE LAW OF EVIDENCE

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A DIGEST

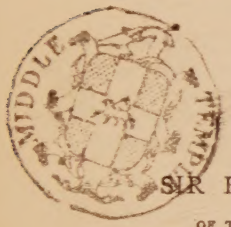
OF THE

LAW OF EVIDENCE

BY THE LATE

SIR JAMES FITZJAMES STEPHEN, BART., K.C.S.I., D.C.L.

ONE OF THE JUDGES OF THE HIGH COURT OF JUSTICE
AND AN HONORARY FELLOW OF TRINITY COLLEGE, CAMBRIDGE



TENTH EDITION

BY

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PREFACE TO THE TENTH EDITION.

No practically important alterations in the Law of Evidence have been made either by legislation or by judicial decisions since the publication of the ninth edition of this book, though the decisions Lloyd *v.* Powell Duffryn, pp. 41, 181, and R. *v.* Crippen, p. 57, are interesting developments of the previously existing law, and R. *v.* Welland has become obsolete.

As may be seen from Notes 1, on p. 124, 1, on p. 136, and 3, on p. 139, legislation has aggravated rather than lightened the task of the text-book writer.

The Appendix has, it is believed, been found practically useful, and has accordingly been brought up to date, partly with the assistance of the second edition of Wills on Evidence from the first edition of which it was to a great extent copied; but it must be recognised that it deals with details to an extent that is inconsistent with the principles on which the book was originally written.

The introduction is left as the author wrote it in 1876 and republished it for the last time in 1887.

H. S.
H. L. S.

June, 1922.

INTRODUCTION.

In the years 1870–71 I drew what afterwards became the Indian Evidence Act (Act 1 of 1872). This Act began by repealing (with a few exceptions) the whole of the Law of Evidence then in force in India, and proceeded to re-enact it in the form of a code of 167 sections, which has been in operation in India since Sept. 1872. I am informed that it is generally understood, and has required little judicial commentary or exposition.

In the autumn of 1872 Lord Coleridge (then Attorney-General) employed me to draw a similar code for England. I did so in the course of the winter, and we settled it in frequent consultations. It was ready to be introduced early in the Session of 1873. Lord Coleridge made various attempts to bring it forward, but he could not succeed till the very last day of the Session. He said a few words on the subject on the 5th August, 1873, just before Parliament was prorogued. The Bill was thus never made public, though I believe it was ordered to be printed.

It was drawn on the model of the Indian Evidence Act, and contained a complete system of law upon the subject of evidence.

The present work is founded upon this Bill, though it

differs from it in various respects. Lord Coleridge's Bill proposed a variety of amendments of the existing law. These are omitted in the present work, which is intended to represent the existing law exactly as it stands. The Bill, of course, was in the ordinary form of an Act of Parliament. In the book I have allowed myself more freedom of expression, though I have spared no pains to make my statements precise and complete.

In December, 1875, at the request of the Council of Legal Education, I undertook the duties of Professor of Common Law, at the Inns of Court, and I chose the Law of Evidence for the subject of my first course of lectures. It appeared to me that the draft Bill which I had prepared for Lord Coleridge supplied the materials for such a statement of the law as would enable students to obtain a precise and systematic acquaintance with it in a moderate space of time, and without a degree of labour disproportionate to its importance in relation to other branches of the law. No such work, so far as I know, exists; for all the existing books on the Law of Evidence are written on the usual model of English law-books, which, as a general rule, aim at being collections more or less complete of all the authorities upon a given subject to which a judge would listen in an argument in court. Such works often become, under the hands of successive editors, the repositories of an extraordinary amount of research, but they seem to me to have the effect of making the attainment by direct study of a real knowledge of the law, or of any branch of it as a whole, almost impossible. The enormous mass of detail and illustration which they contain, and the habit into which

their writers naturally fall, of introducing into them everything which has any sort of connection, however remote, with the main subject, make these books useless for purposes of study, though they may increase their utility as works of reference. The enormous size and length of the standard works of reference are a proof of this. They consist of thousands of pages and refer to many thousand cases. When we remember that the Law of Evidence forms only one branch of the Law of Procedure, and that the Substantive Law which regulates rights and duties ought to be treated independently of it, it becomes obvious that if a lawyer is to have anything better than a familiarity with indexes, he must gain his knowledge in some other way than from existing books. No doubt such knowledge is to be gained. Experience gives by degrees, in favourable cases, a comprehensive acquaintance with the principles of the law with which a practitioner is conversant. He gets to see that it is shorter and simpler than it looks, and to understand that the innumerable cases which at first sight appear to constitute the law, are really no more than illustrations of a comparatively small number of principles; but those who have gained knowledge of this kind have usually no opportunity to impart it to others. Moreover, they acquire it very slowly, and with needless labour themselves, and though knowledge so acquired is often specially vivid and well remembered, it is often fragmentary, and the possession of it not unfrequently renders those who have it sceptical as to the possibility, and even as to the expediency, of producing anything more systematic and complete.

The circumstances already mentioned led me to put

into a systematic form such knowledge of the subject as I had acquired. This work is the result. The labour bestowed upon it has, I may say, been in an inverse ratio to its size.

My object in it has been to separate the subject of evidence from other branches of the law with which it has commonly been mixed up; to reduce it into a compact systematic form, distributed according to the natural division of the subject-matter; and to compress into precise definite rules, illustrated by examples, such cases and statutes as properly relate to the subject-matter so limited and arranged. I have attempted, in short, to make a digest of the law, which, if it were thought desirable, might be used in the preparation of a code, and which will, I hope, be useful, not only to professional students, but to every one who takes an intelligent interest in a part of the law of his country bearing directly on every kind of investigation into question of fact, as well as on every branch of litigation.

The Law of Evidence is composed of two elements, namely, first, an enormous number of cases, almost all of which have been decided in the course of the last 100 or 150 years, and which have already been collected and classified in various ways by a succession of text-writers, from Gilbert and Peake to Taylor and Roscoe; secondly, a comparatively small number of Acts of Parliament which have been passed in the course of the last thirty or forty years, and have effected a highly beneficial revolution in the law as it was when it attracted the denunciations of Bentham. Writers on the Law of Evidence usually refer to statutes by the hundred, but the Acts of Parliament which really relate

to the subject are but few. A detailed account of this matter will be found at the end of the volume, in Note XLVIII.

The arrangement of this book is the same as that of the Indian Evidence Act, and is based upon the distinction between relevancy and proof, that is, between the question, What facts may be proved? and the question, How must a fact be proved assuming that proof of it may be given? The neglect of this distinction, which is concealed by the ambiguity of the word "evidence" (a word which sometimes means testimony and at other times relevancy), has thrown the whole subject into confusion, and has made what is really plain enough appear almost incomprehensible.

In my 'Introduction to the Indian Evidence Act,' published in 1872, and in speeches made in the Indian Legislative Council, I enter fully upon this matter. It will be sufficient here to notice shortly the principle on which the arrangement of the subject is based, and the manner in which the book has been arranged in consequence.

The great bulk of the Law of Evidence consists of negative rules declaring what, as the expression runs, is not evidence.

The doctrine that all the facts in issue and relevant to the issue, and no others, may be proved, is the unexpressed principle which forms the centre of and gives unity to all these express negative rules. To me these rules always appeared to form a hopeless mass of confusion, which might be remembered by a great effort, but could not be understood as a whole, or reduced to a system, until it occurred to me to ask the question, What is this evidence which you tell me hearsay is not? The expression "hearsay is not evidence" seemed to assume that I knew by the

light of nature what evidence was, but I perceived at last that that was just what I did not know. I found that I was in the position of a person who, having never seen a cat, is instructed about them in this fashion: "Lions are not cats, nor are tigers nor leopards, though you might be inclined to think they were." Show me a cat to begin with, and I at once understand both what is meant by saying that a lion is not a cat, and why it is possible to call him one. Tell me what evidence is, and I shall be able to understand why you say that this and that class of facts are not evidence. The question, What is evidence? gradually disclosed the ambiguity of the word. To describe a matter of fact as "evidence" in the sense of testimony is obviously nonsense. No one wants to be told that hearsay, whatever else it is, is not testimony. What, then, does the phrase mean? The only possible answer is: It means that the one fact either is or else is not considered by the person using the expression to furnish a premiss or part of a premiss from which the existence of the other is a necessary or probable inference—in other words, that the one fact is or is not relevant to the other. When the inquiry is pushed further, and the nature of relevancy has to be considered in itself, and apart from legal rules about it, we are led to inductive logic, which shows that the judicial evidence is only one case of the general problem of science—namely, inferring the unknown from the known. As far as the logical theory of the matter is concerned, this is an ultimate answer. The logical theory was cleared up by Mr. Mill. Bentham and some other [1]

[1] See, *e.g.*, that able and interesting book, 'An Essay on Circumstantial Evidence,' by the late Mr. Wills, father of Mr. Justice Wills.

writers had more or less discussed the connection of logic with the rules of evidence. But I am not aware that it occurred to any one before I published my 'Introduction to the Indian Evidence Act' to point out in detail the very close resemblance which exists between Mr. Mill's theory and the existing state of the law.

The law has been worked out by degrees by many generations of judges who perceived more or less distinctly the principle on which it ought to be founded. The rules established by them no doubt treat as relevant some facts which cannot perhaps be said to be so. More frequently they treat as irrelevant facts which are really relevant, but, exceptions excepted, all their rules are reducible to the principle that facts in issue or relevant to the issue, and no others, may be proved.

The following outline of the contents of this work will show how in arranging it I have applied this principle.

All law may be divided into Substantive Law, by which rights, duties, and liabilities are defined, and the Law of Procedure, by which the Substantive Law is applied to particular cases.

The Law of Evidence is that part of the Law of Procedure which, with a view to ascertain individual rights and liabilities in particular cases, decides:

I. What facts may, and what may not, be proved in such cases;

II. What sort of evidence must be given of a fact which may be proved;

Chief Baron Gilbert's work on the Law of Evidence is founded on Locke's 'Essay,' much as my work is founded on Mill's 'Logic.'

III. By whom and in what manner the evidence must be produced by which any fact is to be proved.

I. The facts which may be proved are facts in issue, or facts relevant to the issue.

Facts in issue are those facts upon the existence of which the right or liability to be ascertained in the proceeding depends.

Facts relevant to the issue are facts from the existence of which inferences as to the existence of the facts in issue may be drawn.

A fact is relevant to another fact when the existence of the one can be shown to be the cause or one of the causes, or the effect or one of the effects, of the existence of the other, or when the existence of the one, either alone or together with other facts, renders the existence of the other highly probable, or improbable, according to the common course of events.*

Four classes of facts, which in common life would usually be regarded as falling within this definition of relevancy, are excluded from it by the Law of Evidence except in certain cases :

1. Facts similar to, but not specially connected with, each other. (*Res inter alios actæ.*)

2. The fact that a person not called as a witness has asserted the existence of any fact. (*Hearsay.*)

3. The fact that any person is of opinion that a fact exists. (*Opinion.*)

4. The fact that any person's character is such as to render conduct imputed to him probable or improbable. (*Character.*)

* See Note I.

To each of those four exclusive rules there are, however, important exceptions, which are defined by the Law of Evidence.

II. As to the manner in which a fact in issue or relevant fact must be proved.

Some facts need not be proved at all, because the Court will take judicial notice of them, if they are relevant to the issue.

Every fact which requires proof must be proved either by oral or by documentary evidence.

Every fact, except (speaking generally) the contents of a document, must be proved by oral evidence. Oral evidence must in every case be direct, that is to say, it must consist of an assertion by the person who gives it that he directly perceived the fact to the existence of which he testifies.

Documentary evidence is either primary or secondary. Primary evidence is the document itself produced in court for inspection.

Secondary evidence varies according to the nature of the document. In the case of private documents a copy of the document, or an oral account of its contents, is secondary evidence. In the case of some public documents, examined or certified copies, or exemplifications, must or may be produced in the absence of the documents themselves.

Whenever any public or private transaction has been reduced to a documentary form, the document in which it is recorded becomes exclusive evidence of that transaction, and its contents cannot, except in certain cases expressly defined, be varied by oral evidence, though secondary evidence may be given of the contents of the document.

III. As to the person by whom, and the manner in which the proof of a particular fact must be made.

When a fact is to be proved, evidence must be given of it by the person upon whom the burden of proving it is imposed, either by the nature of the issue or by any legal presumption, unless the fact is one which the party is estopped from proving by his own representations, or by his conduct, or by his relation to the opposite party.

The witnesses by whom a fact is to be proved must be competent. With very few exceptions, every one is now a competent witness in all cases. Competent witnesses, however, are not in all cases compelled or even permitted to testify.

The evidence must be given upon oath, or in certain excepted cases without oath. The witnesses must be first examined in chief, then cross-examined, and then re-examined. Their credit may be tested in certain ways, and the answers which they give to questions affecting their credit may be contradicted in certain cases and not in others.

This brief statement will show what I regard as constituting the Law of Evidence properly so called. My view of it excludes many things which are often regarded as forming part of it. The principal subjects thus omitted are as follows:—

I regard the question, What may be proved under particular issues? (which many writers treat as part of the Law of Evidence) as belonging partly to the subject of pleading, and partly to each of the different branches into which the Substantive Law may be divided.

A is indicted for murder, and pleads Not Guilty. This

plea puts in issue, amongst other things, the presence of any state of mind describable as malice aforethought, and all matters of justification or extenuation.

Starkie and Roscoe treat these subjects at full length, as supplying answers to the question, What can be proved under an issue of Not Guilty on an indictment for murder? Mr. Taylor does not go so far as this; but a great part of his book is based upon a similar principle of classification. Thus chapters i. and ii. of Part II. are rather a treatise on pleading than a treatise on evidence.

Again, I have dealt very shortly with the whole subject of presumptions. My reason is that they also appear to me to belong to different branches of the Substantive Law, and to be unintelligible, except in connection with them. Take for instance the presumption that every one knows the law. The real meaning of this is that, speaking generally, ignorance of the law is not taken as an excuse for breaking it. This rule cannot be properly appreciated if it is treated as a part of the Law of Evidence. It belongs to the Criminal Law. In the same way numerous presumptions as to rights of property (in particular easements and incorporeal hereditaments) belong not to the Law of Evidence but to the Law of Real Property. The only presumptions which, in my opinion, ought to find a place in the Law of Evidence, are those which relate to facts merely as facts, and apart from the particular rights which they constitute. Thus the rule, that a man not heard of for seven years is presumed to be dead, might be equally applicable to a dispute as to the validity of the marriage, an action of ejectment by a reversioner against a tenant *pur autre vie*, the

admissibility of a declaration against interest, and many other subjects. After careful consideration, I have put a few presumptions of this kind into a chapter on the subject, and have passed over the rest as belonging to different branches of the Substantive Law.

Practice, again, appears to me to differ in kind from the Law of Evidence. The rules which point out the manner in which the attendance of witnesses is to be procured, evidence is to be taken on commission, depositions are to be authenticated and forwarded to the proper officers, interrogatories are to be administered, &c., have little to do with the general principles which regulate the relevancy and proof of matters of fact. Their proper place would be found in codes of civil and criminal procedure. I have, however, noticed a few of the most important of these matters.

A similar remark applies to a great mass of provisions as to the proof of certain particulars. Under the head of "Public Documents," Mr. Taylor gives amongst other things a list of all, or most, of the statutory provisions which render certificates or certified copies admissible in particular cases.

To take an illustration at random, section 1458 (6th ed., 1872) begins thus: "The registration of medical practitioners under the Medical Act of 1858, may be proved by a copy of the 'Medical Register,' for the time being, purporting," &c. I do not wish for a moment to undervalue the practical utility of such information, or the industry displayed in collecting it; but such provision as this appears to me to belong, not to the Law of Evidence, but to the law relating to medical men. It is a matter

rather for an index or schedule than for a legal treatise, intended to be studied, understood, and borne in mind in practice.

On several other points the distinction between the Law of Evidence and other branches of the law is more difficult to trace. For instance, the law of estoppel, and the law relating to the interpretation of written instruments, both run into the Law of Evidence. I have tried to draw the line in the case of estoppels by dealing with estoppels *in pais* only, to the exclusion of estoppels by deed and by matter of record, which must be pleaded as such; and in regard to the law of written instruments, by stating those rules only which seemed to me to bear directly on the question whether a document can be supplemented or explained by oral evidence.

The result is no doubt to make the statement of the law much shorter than is usual. I hope, however, that competent judges will find that, as far as it goes, the statement is both full and correct. As to brevity, I may say, in the words of Lord Mansfield: "The law does not consist of particular cases, but of general principles which are illustrated and explained in those cases." [1]

Every one will express somewhat differently the principles which he draws from a number of illustrations, and this is one source of that quality of our law which those who dislike it describe as vagueness and uncertainty, and those who like it as elasticity. I dislike the quality in question, and I used to think that it would be an improvement if the law were once for all enacted in a distinct form by the

[1] *R.* v. *Bembridge*, 1783, 3 Doug. 332.

Legislature, and were definitely altered from time to time as occasion required. For many years I did my utmost to get others to take the same view of the subject, but I am now convinced by experience that the unwillingness of the Legislature to undertake such an operation proceeds from a want of confidence in its power to deal with such subjects, which is neither unnatural nor unfounded. It would be as impossible to get in Parliament a really satisfactory discussion of a Bill codifying the Law of Evidence as to get a committee of the whole House to paint a picture. It would, I am equally well satisfied, be quite as difficult at present to get Parliament to delegate its powers to persons capable of exercising them properly. In the meanwhile the Courts can decide only upon cases as they actually occur, and generations may pass before a doubt is set at rest by a judicial decision expressly in point. Hence, if anything considerable is to be done towards the reduction of the law to a system, it must, at present at least, be done by private writers.

Legislation proper is, under favourable conditions, the best way of making the law; but if that is not to be had, indirect legislation, the influence on the law of judges and legal writers, who deduce, from a mass of precedents, such principles and rules as appear to them to be suggested by the great bulk of the authorities, and to be in themselves rational and convenient, is very much better than none at all. It has, indeed, special advantages, which this is not the place to insist upon. I do not think the law can be in a less creditable condition than that of an enormous mass of isolated decisions, and statutes assuming unstated

principles; cases and statutes alike being accessible only by elaborate indexes. I insist upon this because I am well aware of the prejudice which exists against all attempts to state the law simply, and of the rooted belief which exists in the minds of many lawyers that all general propositions of law must be misleading and delusive, and that law books are useless except as indexes. An ancient maxim says, "*Omnis definitio in jure periculosa.*" Lord Coke wrote, "It is ever good to rely upon the books at large; for many times *compendia sunt dispendia*, and *Melius est petere fontes quam sectari rivulos.*" Mr. Smith chose this expression as the motto of his 'Leading Cases,' and the sentiment which it embodies has exercised immense influence over our law. It has not perhaps been sufficiently observed that when Coke wrote, the "books at large," namely the 'Year Books' and a very few more modern reports, contained probably about as much matter as two, or at most three, years of the reports published by the Council of Law Reporting; and that the *compendia* (such books, say, as Fitzherbert's 'Abridgment') were merely abridgments of the cases in the 'Year Books' classified in the roughest possible manner, and much inferior both in extent and arrangement to such a book as Fisher's 'Digest.'[1]

In our own days it appears to me that the true *fontes* are not to be found in reported cases, but in the rules and principles which such cases imply, and that the cases themselves are the *rivuli*, the following of which is a *dispendium*. My attempt in this work has been emphatically *petere fontes*,

[1] The 'Year Books' from 1307–1535, 228 years, would fill not more than twenty-five volumes of the 'Law Reports.'

to reduce an important branch of the law to the form of a connected system of intelligible rules and principles.

Should the undertaking be favourably received by the profession and the public, I hope to apply the same process to some other branches of the law; for the more I study and practise it, the more firmly am I convinced of the excellence of its substance and the defects of its form. Our earlier writers, from Coke to Blackstone, fell into the error of asserting the excellence of its substance in an exaggerated strain, whilst they showed much insensibility to defects, both of substance and form, which in their time were grievous and glaring. Bentham seems to me in many points to have fallen into the converse error. He was too keen and bitter a critic to recognise the substantial merits of the system which he attacked; and it is obvious to me that he had not that mastery of the law itself which is unattainable by mere theoretical study, even if the student is, as Bentham certainly was, a man of talent, approaching closely to genius.

During the last generation or more Bentham's influence has to some extent declined, partly because some of his books are like exploded shells, buried under the ruins which they have made, and partly because, under the influence of some of the most distinguished of living authors, great attention has been directed to legal history, and in particular to the study of Roman Law. It would be difficult to exaggerate the value of these studies, but their nature and use are liable to be misunderstood. This history of the Roman Law no doubt throws great light on the history of our own; and the comparison of the two great bodies of law, under

one or the other of which the laws of the civilised world may be classified, cannot fail to be instructive; but the history of bygone institutions is valuable mainly because it enables us to understand, and so to improve, existing institutions. It would be a complete mistake to suppose either that the Roman Law is in substance wiser than our own, or that in point of arrangement and method the Institutes and the Digest are anything but warnings. The pseudo-philosophy of the Institutes, and the confusion of the Digest, are, to my mind, infinitely more objectionable than the absence of arrangement and of all general theories, good or bad, which distinguish the Law of England.

However this may be, I trust the present work will show that the Law of England on the subject to which it refers is full of sagacity and practical experience, and is capable of being thrown into a form at once plain, short, and systematic.

I wish, in conclusion, to direct attention to the manner in which I have dealt with such parts of the Statute Law as are embodied in this work. I have given, not the very words of the enactments referred to, but what I understand to be their effect, though in doing so I have deviated as little as possible from the actual words employed. I have done this in order to make it easier to study the subject as a whole. Every Act of Parliament which relates to the Law of Evidence assumes the existence of the unwritten law. It cannot, therefore, be fully understood, nor can its relation to other parts of the law be appreciated, till the unwritten law has been written down so that the provision of particular statutes may take their places as parts of it. When

this is done, the Statute Law itself admits of, and even requires, very great abridgment. In many cases the result of a number of separate enactments may be stated in a line or two. For instance, the old Common Law as to the incompetency of certain classes of witnesses was removed by parts of six different Acts of Parliament—the net result of which is given in four short articles (106–109).

So, too, the doctrine of incompetency for peculiar or defective religious belief has been removed by many different enactments, the effect of which is shown in one article (123).

The various enactments relating to documentary evidence (see chap. x.) appear to me to become easy to follow and to appreciate when they are put in their proper places in a general scheme of the law, and arranged according to their subject-matter. By rejecting every part of an Act of Parliament except the actual operative words which constitute its addition to the law, and by setting it (so to speak) in a definite statement of the unwritten law of which it assumes the existence, it is possible to combine brevity with substantial accuracy and fulness of statement to an extent which would surprise those who are acquainted with Acts of Parliament only as they stand in the Statute Book.[1] At the same time, I should warn any one who may use this book for the purposes of actual practice in or out of court, that he would do well to refer to the very words of the statutes embodied in it. It is very possible that, in stating their effect instead of their actual words, I

[1] For a reference to statutes dealing strictly with evidence, see Note XLVIII., *post*.

may have given in some particulars a mistaken view of their meaning.

Such are the means by which I have endeavoured to make a statement of the Law of Evidence which will enable not only students of law, but I hope any intelligent person who cares enough about the subject to study attentively what I have written, to obtain from it a knowledge of that subject at once comprehensive and exact—a knowledge which would enable him to follow in an intelligent manner the proceedings of Courts of Justice, and which would enable him to study cases and use text-books of the common kind with readiness and ease. I do not say more than this. I have not attempted to follow the matter out into its minute ramifications, and I have avoided reference to what after all are little more than matters of curiosity. I think, however, that any one who makes himself thoroughly acquainted with the contents of this book, will know fully and accurately all the leading principles and rules of evidence which occur in actual practice.

If I am entitled to generalise at all from my own experience, I think that even those who are already well acquainted with the subject will find that they understand the relations of its different parts, and therefore the parts themselves, more completely than they otherwise would, by being enabled to take them in at one view, and to consider them in their relation to each other.

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LIST OF ABBREVIATIONS.

[ ] A. C. . . .	Law Reports: Appeal Cases.
A. & E.	Adolphus & Ellis's Reports.
Atk.	Atkyns's Reports.
B. & A.	Barnewall and Alderson's Reports.
B. & Ad.	Barnewall and Adolphus's Reports.
B. & B.	Broderip & Bingham's Reports.
B. & C.	Barnewall & Cresswell's Reports.
B. & P.	Bosanquet and Puller's Reports.
B. & S.	Best and Smith's Reports.
B. N. P.	Buller's Nisi Prius.
Beav.	Beavan's Reports.
Bell, C. C. . . .	Bell's Crown Cases.
Best	Best on Evidence, 6th ed.
Bing.	Bingham's Reports.
Bing. N. C. . . .	Bingham's New Cases.
Bligh	Bligh's Reports, House of Lords.
Br. P. C.	Brown's Parliamentary Cases.
Buller, N. P. . . .	Buller's Nisi Prius.
C. & F.	Clark & Finnelly's Reports.
C. & J.	Crompton & Jervis's Reports.
C. & Marsh. . . .	Carrington & Marshman's Reports.
C. & P.	Carrington & Payne's Reports.
C. B.	Common Bench Reports.
C. B. (N. S.) . . .	Common Bench Reports. New Series.
C. M. & R. . . .	Crompton, Meeson, & Roscoe's Reports.
Camp.	Campbell's Reports.
Car. & Kir. . . .	Carrington's, and Kirwan's Reports.
Coke	Coke's Reports.
Cowp.	Cowper's Reports.
Cox.	Cox's Reports, Chancery.
Cox, C. C. . . .	Cox's Criminal Cases.

D. (or Dears.) & B.	Dearsley & Bell's Crown Cases.
Dears., or Dearsley & P.	Dearsley's Crown Cases.
De G. & J.	De Gex & Jones's Reports.
De G. M. & G.	De Gex, Macnaghten, & Gordon's Bankruptcy Cases.
De G. & S.	De Gex & Smale's Reports.
Den. C. C.	Denison's Crown Cases.
Doug.	Douglas's Reports.
Dow & Cl.	Dow & Clark's House of Lords Cases.
Dru. & War.	Drury & Warren's Reports.
E. & B.	Ellis & Blackburn's Reports.
Ea.	East's Reports.
East, P. C.	East's Pleas of the Crown.
Esp.	Espinasse's Reports.
Ex.	Exchequer Reports.
F. & F.	Foster & Finlason's Reports.
Gen. View Crim. Law	Stephen's General View of the Criminal Law
Godbolt	Godbolt's Reports, K. B.
H. & C.	Hurlstone & Coltman's Reports.
H. & N.	Hurlstone & Norman's Reports.
H. L. C.	House of Lords Cases.
Hale, P. C.	Hale's Pleas of the Crown.
Hare	Hare's Reports.
H. Bl.	H. Blackstone's Reports.
Ir. Cir. Rep.	Irish Circuit Reports.
Ir. Eq. Rep.	Irish Equity Reports.
Jac. & Wal.	Jacob & Walker's Reports.
Jebb, C. C.	Jebb's Crown Cases (Ireland).
K. & J.	Kay & Johnson's Reports.
Keen	Keen's Reports, Chancery.
L. & C.	Leigh & Cave's Crown Cases.
Leach	Leach's Crown Cases.

M. & G.	Manning & Granger's Reports.
M. & K.	Mylne & Keen's Reports.
M. & M.	Moody & Malkin's Reports.
M. & R.	Moody & Ryan's Reports.
M. & S.	Maule and Selwyn's Reports.
M. & W.	Meeson & Welsby's Reports.
Madd.	Maddock's Reports.
Man. & Ry. . . .	Manning & Ryland's Reports.
McNally Ev. . . .	McNally's Rules of Evidence.
Moo. C. C. . . .	Moody's Crown Cases.
Moo. P. C. . . .	Moore's Privy Council Reports.
Mo. & Ro. . . .	Moody & Robinson's Reports.
N. C.	Bingham's New Cases.
Pea. R.	Peake's Reports.
Phill.	Phillip's Reports.
Ph. Ev.	Phillips on Evidence, 10th ed.
Phipson	Phipson's Law of Evidence, 6th ed.
Price	Price's Reports.
Q.B.	Queen's Bench Reports.
R. & R.	Russell & Ryan's Crown Cases.
Rep.	Coke's Reports.
Roscoe's Cr. Ev. . .	Roscoe's Criminal Evidence, 14th ed.
R. N. P., or . . . } Roscoe, N. P. . . . }	Roscoe's Nisi Prius, 18th ed.
Russ. Cri.	Russell on Crimes, 6th ed.
Russ. & Myl . . .	Russell and Mylne's Reports, Chancery
Selw. N. P. . . .	Selwyn's Nisi Prius.
Simon	Simons' Reports.
Sim. (N. S.) . . .	Simons' Reports. New Series.
Sim. & Stu. . . .	Simon & Stuart's Reports.
S. L. C., or . . . } Smith, L. C. . . . }	Smith's Leading Cases, 12th ed.
Star.	Starkie's Reports.
Starkie, or . . . } Star. Ev. . . . }	Starkie on Evidence, 4th ed.
S. T., or St. Tri. . .	State Trials.

Story's Eq. Jur.	Story's Equity Jurisprudence.
Swab. Ad.	Swabey's Admiralty Reports.
Sw. & Tr., or Swa. & Tri., or S. & T.	Swabey & Tristram's Reports, Probate and Divorce.
T. R.	Term Reports.
T. E.	Taylor on Evidence, 9th ed.
Tau.	Taunton's Reports.
Ve.	Vesey's Reports.
Vin. Abr.	Viner's Abridgment.
Wigram	Wigram on Extrinsic Evidence.
Wills' Circ. Ev.	Wills on Circumstantial Evidence.
Wils., or Wilson	Wilson's Reports.

TEXT-BOOKS REFERRED TO.

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A DIGEST

OF

THE LAW OF EVIDENCE.

PART I.

RELEVANCY.

CHAPTER I.

PRELIMINARY.

ARTICLE 1.*

DEFINITION OF TERMS.

IN this book the following words and expressions are used in the following senses, unless a different intention appears from the context:—

"Judge" includes all persons authorised to take evidence, either by law or by the consent of the parties.

"Fact" includes the fact that any mental condition of which any person is conscious exists.

"Document" means any substance having any matter expressed or described upon it by marks capable of being read.

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* See Note I.

"Evidence" means—

(1) Statements made by witnesses in court under a legal sanction, in relation to matters of fact under inquiry;

such statements are called oral evidence:

(2) Documents produced for the inspection of the Court or judge;

such documents are called documentary evidence.

"Conclusive proof" means evidence upon the production of which, or a fact upon the proof of which, the judge is bound by law to regard some fact as proved, and to exclude evidence intended to disprove it.

"A presumption" means a rule of law that Courts and judges shall draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of such inference is disproved.

The expression "facts in issue" means—

(1) All facts which, by the form of the pleadings in any action, are affirmed on one side and denied on the other:

(2) In actions in which there are no pleadings, or in which the form of the pleadings is such that distinct issues are not joined between the parties, all facts from the establishment of which the existence, non-existence, nature, or extent of any right, liability, or disability asserted or denied in any such case would by law follow.

The word "relevant" means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other.

CHAPTER II.

OF FACTS IN ISSUE AND RELEVANT TO THE ISSUE.

ARTICLE 2.*

FACTS IN ISSUE AND FACTS RELEVANT TO THE ISSUE MAY BE PROVED.

EVIDENCE may be given in any proceeding of any fact in issue,

and of any fact relevant to any fact in issue unless it is hereinafter declared to be deemed to be irrelevant,

and of any fact hereinafter declared to be deemed to be relevant to the issue, whether it is or is not relevant thereto.

Provided that the judge may exclude evidence of facts which, though relevant or deemed to be relevant to the issue, appear to him too remote to be material under all the circumstances of the case.

Illustration.

(*a*) A is indicted for the murder of B, and pleads not guilty.

The following facts may be in issue :—The fact that A killed B ; the fact that at the time when A killed B he was prevented by disease from knowing right from wrong ; the fact that A had received from B such provocation as would reduce A's offence to manslaughter.

The fact that A was at a distant place at the time of the murder would be relevant to the issue ; the fact that A had a good character would be deemed to be relevant ; the fact that C on his deathbed declared that C and not A murdered B would be deemed not to be relevant.

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* See Note II.

ARTICLE 3.

RELEVANCY OF FACTS FORMING PART OF THE SAME TRANSACTION AS THE FACTS IN ISSUE.

A transaction is a group of facts so connected together as to be referred to by a single legal name, as a crime, a contract, a wrong, or any other subject of inquiry which may be in issue.

Every fact which is part of the same transaction as the facts in issue is deemed to be relevant to the facts in issue, although it may not be actually in issue, and although if it were not part of the same transaction it might be excluded as hearsay.

Whether any particular fact is or is not part of the same transaction as the facts in issue is a question of law upon which no principle has been stated by authority, and on which single judges have given different decisions.

When a question as to the ownership of land depends on the application to it of a particular presumption capable of being rebutted, the fact that it does not apply to other neighbouring pieces of land similarly situated is deemed to be relevant.

Illustrations.

(*a*) The question was, whether A murdered B by shooting him.

The fact that a witness in the room with B when he was shot, saw a man with a gun in his hand pass a window opening into the room in which B was shot, and thereupon exclaimed, "There's butcher!" (a name by which A was known), was allowed to be proved by Lord Campbell, L. C. J.[1]

[1] *R.* v. *Fowkes*, Leicester Spring Assizes, 1856. Ex relatione O'Brien, Serjt.

(*b*) The question was, whether A cut B's throat, or whether B cut it herself.

A statement made by B when running out of the room in which her throat was cut immediately after it had been cut was not allowed to be proved by Cockburn, L. C. J.[1]

(*c*) The question was, whether A was guilty of the manslaughter of B by carelessly driving over him.

In the report of this case in the *Times* for March 8, 1856, the evidence of the witnesses on this point is thus given :—

"*William Fowkes :* My father got up [? went to] the window, and opened it and shoved the shutter back. He waited there about three minutes. It was moonlight, the moon about the full. He closed the window, but not the shutter. My father was returning to the sofa when I heard a crash at the window. I turned to look, and hooted, 'There's butcher!' I saw his face at the window, but did not see him plain. He was standing still outside. I aren't able to tell who it was, not certainly. I could not tell his size. While I was hooting the gun went off. I hooted very loud. He was close to the shutter or thereabouts. It was only open about eight inches. *Lord Campbell :* Did you see the face of the man? *Witness :* Yes ; it was moonlight at the time. I have a belief that it was the butcher. I believe it was. I now believe it from what I then saw. I heard the gun go off when he went away. We heard him run by the window through the garden towards the park."

Upon cross-examination the witness said that he saw the face when he hooted and heard the report at the same moment. The report adds, "The statement of this witness was confirmed by Cooper, the policeman (who was in the room at the time), except that Cooper saw nothing when William Fowkes hooted, 'There's butcher at the window!'" He stated he had not time to look before the gun went off. In this case the evidence as to W. Fowkes's statement could not be admissible on the ground that what he said was in the prisoner's presence, as the window was shut when he spoke. It is also obvious that the fact that he said at the time "There's butcher!" was far more likely to impress the jury than the fact that he was at the trial uncertain whether the person he saw was the butcher, though he was disposed to think so.

[1] *R.* v. *Bedingfield*, Suffolk Assizes, 1879, 14 Cox, C. C. 341. The propriety of this decision was the subject of two pamphlets, one by W. Pitt Taylor, who denied, the other by the Lord Chief Justice, who maintained it.

A statement made by B as to the cause of his accident as soon as he was picked up was allowed to be proved by Park, J., Gurney, B., and Patteson, J., though it was not a dying declaration within article 26.[1]

(*d*) The question is, whether A the owner of one side of a river owns the entire bed of it or only half the bed at a particular spot. The fact that he owns the entire bed a little lower down than the spot in question is deemed to be relevant.[2]

(*e*) The question is, whether a piece of land by the roadside belongs to the lord of the manor or to the owner of the adjacent land. The fact that the lord of the manor owned other parts of the slip of land by the side of the same road is deemed to be relevant.[3]

ARTICLE 4.*

ACTS OF CONSPIRATORS.

When two or more persons conspire together to commit any offence or actionable wrong, everything said, done, or written by any one of them in the execution or furtherance of their common purpose, is deemed to be so said, done, or written by every one, and is deemed to be a relevant fact as against each of them; but statements made by individual conspirators as to measures taken in the execution of furtherance of any such common purpose are not deemed to be relevant as such as against any conspirators, except those by whom or in whose presence such statements are made. Evidence of acts or statements deemed to be relevant under this article may not be given until the judge is satisfied that, apart from them, there are primâ facie grounds for believing in the existence of the conspiracy to which they relate.

* See Note III.

[1] *R.* v. *Foster*, 1834, 6 C. & P. 325.

[2] *Jones* v. *Williams*, 1837, 2 M. & W. 326.

[3] *Doe* v. *Kemp*, 1831, 7 Bing. 332; 2 Bing. N. C. 102.

Illustrations.

(*a*) The question is, whether A and B conspired together to cause certain imported goods to be passed through the custom-house on payment of too small an amount of duty.

The fact that A made in a book a false entry, necessary to be made in that book in order to carry out the fraud, is deemed to be a relevant fact as against B.

The fact that A made an entry on the counterfoil of his cheque-book, showing that he had shared the proceeds of the fraud with B, is deemed not to be a relevant fact as against B.[1]

(*b*) The question is, whether A committed high treason by imagining the king's death; the overt act charged is that he presided over an organised political agitation calculated to produce a rebellion, and directed by a central committee through local committees.

The facts that meetings were held, speeches delivered, and papers circulated in different parts of the country, in a manner likely to produce rebellion by and by the direction of persons shown to have acted in concert with A, are deemed to be relevant facts as against A, though he was not present at those transactions, and took no part in them personally.

An account given by one of the conspirators in a letter to a friend, of his own proceedings in the matter, not intended to further the common object, and not brought to A's notice, is deemed not to be relevant as against A.[2]

ARTICLE 5.*

TITLE.

When the existence of any right of property, or of any right over property is in question, every fact which constitutes the title of the person claiming the right, or which shows that he, or any person through whom he claims, was in possession of the property, and every fact which constitutes an exercise of the right, or which shows that its exercise was disputed, or which is inconsistent with its

* See Note IV.; see also Article 88 as to the proof of ancient deeds.

[1] *R.* v. *Blake*, 1844, 6 Q. B. 126.

[2] *R.* v. *Hardy*, 1794, 24 S. T. *passim*, but see particularly 451–3.

existence or renders its existence improbable, is deemed to be relevant.

Illustrations.

(*a*) The question is, whether A has a right of fishery in a river.

An ancient *inquisitio post mortem* finding the existence of a right of fishery in A's ancestors, licences to fish granted by his ancestors, and the fact that the licensees fished under them, are deemed to be relevant.[1]

(*b*) The question is, whether A owns land.

The fact that A's ancestors granted leases of it is deemed to be relevant.[2]

(*c*) The question is, whether there is a public right of way over A's land.

The facts that persons were in the habit of using the way, that they were turned back, that the road was stopped up, that the road was repaired at the public expense, and A's title-deeds showing that for a length of time, reaching beyond the time when the road was said to have been used, no one had power to dedicate it to the public, are all deemed to be relevant.[3]

(*d*) The question is, whether A has a several fishery in a river. The proceedings in a possessory suit in the Irish Court of Chancery by the plaintiff's predecessor in title, and a decree in that suit quieting the plaintiff's predecessor in his title, is relevant, as showing possession and enjoyment of the fishery at the time of the suit.[4]

ARTICLE 6.

CUSTOMS.

When the existence of any custom is in question, every fact is deemed to be relevant which shows how, in particular

[1] *Rogers* v. *Allen*, 1808, 1 Camp. 309.

[2] *Doe* v. *Pulman*, 1842, 3 Q. B. 622, 623, 626 (citing *Duke of Bedford* v. *Lopes*). The document produced to show the lease was a counterpart signed by the lessee. See *post*, art. 64.

[3] Common practice. As to the title-deeds, *Brough* v. *Lord Scarsdale*, Derby Summer Assizes, 1865. In this case it was shown by a series of family settlements that for more than a century no one had had a legal right to dedicate a certain footpath to the public.

[4] *Neill* v. *Duke of Devonshire*, 1882, L. R. 8 App. p. 135, and see especially p. 147.

instances, the custom was understood and acted upon by the parties then interested.

Illustrations.

(*a*) The question is, whether, by the custom of borough-English as prevailing in the manor of C, A is heir to B.

The fact that other persons, being tenants of the manor, inherited from ancestors standing in the same or similar relations to them as that in which A stood to B, is deemed to be relevant.[1]

(*b*) The question was, whether by the custom of the country a tenant-farmer not prohibited by his lease from doing so might pick and sell surface flints, minerals being reserved by his lease. The fact that under similar provisions in leases of neighbouring farms flints were taken and sold is deemed to be relevant.[2]

ARTICLE 7.

MOTIVE, PREPARATION, SUBSEQUENT CONDUCT, EXPLANATORY STATEMENTS.

When there is a question whether any act was done by any person, the following facts are deemed to be relevant, that is to say—

any fact which supplies a motive for such an act, or which constitutes preparation for it ;[3]

any subsequent conduct of such person apparently

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[1] *Muggleton* v. *Barnett*, 1856, 1 H. & N. 282 ; and see *Johnstone* v. *Lord Spencer*, 1885, 30 Ch. Div. 581. It was held in this case that a custom might be shown by uniform practice which was not mentioned in any custumal Court roll or other record. For cases of evidence of a custom of trade, see *Ex parte Powell, in re Matthews*, 1875, 1 Ch. D. 501 ; and *Ex parte Turquand, in re Parker*, 1885, 14 Q. B. D. 636. See too the Notes on *Wigglesworth and Dallison*, in 1 Smith's Leading Cases, 613.

[2] *Tucker* v. *Linger*, 1882, L. R. 21 Ch. Div. 18 ; and see p. 37.

[3] Illustrations (*a*) and (*b*).

influenced by the doing of the act, and any act done in consequence of it by or by the authority of that person.[1]

Illustrations.

(*a*) The question is, whether A murdered B.

The facts that, at the instigation of A, B murdered C twenty-five years before B's murder, and that A at or before that time used expressions showing malice against C, are deemed to be relevant as showing a motive on A's part to murder B.[2]

(*b*) The question is, whether A committed a crime.

The fact that A procured the instruments with which the crime was committed is deemed to be relevant.[3]

(*c*) A is accused of a crime.

The facts that, either before or at the time of, or after the alleged crime, A caused circumstances to exist tending to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed things or papers, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence, are deemed to be relevant.[4]

(*d*) The question is, whether A committed a crime.

The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, and the manner in which he conducted himself when statements on the subject were made in his presence and hearing, are deemed to be relevant.[5]

(*e*) The question is, whether A suffered damage in a railway accident.

The fact that A conspired with B, C, and D to suborn false witnesses in support of his case is deemed to be relevant,[6] as conduct subsequent to a fact in issue tending to show that it had not happened.

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[1] Illustrations (*c*) (*d*) and (*e*).

[2] *R.* v. *Clewes*, 1830, 4 C. & P. 221.

[3] *R.* v. *Palmer*, 1856, printed report from Notes of Angelo Taylor and Gen. View, 230–272, *passim*.

[4] *R.* v. *Patch*, 1805, Wills Circ., Ev. (6th Ed.) 442; *R.* v. *Palmer*, ub. sup. (*passim*).

[5] Common practice.

[6] *Moriarty* v. *London, Chatham and Dover Ry. Co.*, 1870, L. R. 5 Q. B. 314; compare *Grey* v. *Redman*, 1875, 1 Q. B. D. 161.

ARTICLE 8.*

STATEMENTS ACCOMPANYING ACTS, COMPLAINTS, STATEMENTS IN PRESENCE OF A PERSON.

Whenever any act may be proved, statements accompanying and explaining that act made by or to the person doing it may be proved if they are necessary to understand it.[1]

In criminal cases the conduct of the person against whom the offence is said to have been committed, and in particular the fact that soon after the offence he made a complaint to persons to whom he would naturally complain, are deemed to be relevant. The terms of the complaint are irrelevant; except that in a case of rape or other sexual offence against a woman or child, the terms of the complaint are relevant as showing that the conduct of such person was consistent with the story told by her.[2]

When a person's conduct is in issue or is deemed to be relevant to the issue, statements made in his presence and hearing by which his conduct is likely to have been affected, are deemed to be relevant.[3]

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* See Note V.

[1] Illustrations (*a*) and (*b*). Other statements made by such persons are relevant or not according to the rules as to statements hereinafter contained. See ch. iv. *post.*

[2] *R.* v. *Osborne*, [1905], 1 K. B. 551, explaining *R.* v. *Lillyman*, [1896], 2 Q. B. 167; see Illustration (*c*) and the note thereto.

[3] *R.* v. *Edmunds*, 1833, 6 C. & P. 164; *Neil* v. *Jakle*, 1849, 2 C. & K. 709.

Illustrations.

(*a*) The question is, whether A committed an act of bankruptcy, by departing the realm with intent to defraud his creditors.

Letters written during his absence from the realm, indicating such an intention, are deemed to be relevant facts.[1]

(*b*) The question is, whether A was sane.

The fact that he acted upon a letter received by him is part of the facts in issue. The contents of the letter so acted upon are deemed to be relevant, as statements accompanying and explaining such conduct.[2]

(*c*) The question is, whether A was carnally known, either feloniously or unlawfully.

The fact that shortly after the alleged offence, she made a complaint relating to the crime, and the terms of the complaint, and the circumstances under which it was made, are relevant.[3]

The fact that, without making a complaint, she said that she had been ravished, is not deemed to be relevant as conduct under this article, though it might be deemed to be relevant (*e.g.*) as a dying declaration under article 26.

ARTICLE 9.

FACTS NECESSARY TO EXPLAIN OR INTRODUCE RELEVANT FACTS.

Facts necessary to be known to explain or introduce a fact in issue or relevant or deemed to be relevant to the issue, or which support or rebut an inference suggested by any such fact, or which establish the identity of any thing or person whose identity is in issue or is or is deemed to be relevant to the issue, or which fix the time or place at which

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[1] *Rawson* v. *Haigh*, 1824, 2 Bing. 99; *Bateman* v. *Bailey*, 1794, 5 T. R. 512.

[2] *Wright* v. *Doe* d. *Tatham*, 1837, 7 A. & E. 324-5 (*per* Denman, C. J.).

[3] *R.* v. *Osborne*, [1905], 1 K. B. 551, explaining *R.* v. *Lillyman*, [1896], 2 Q. B. 167, and see *R.* v. *Norcott*, [1917], 1 K. B. 347. The above illustration and that portion of the text which is founded on it, are intended to express the substantial result of the decisions in these cases.

any such fact happened, or which show that any document produced is genuine or otherwise, or which show the relation of the parties by whom any such fact was transacted, or which afforded an opportunity for its occurrence or transaction, or which are necessary to be known in order to show the relevancy of other facts, are deemed to be relevant in so far as they are necessary for those purposes respectively.

Illustrations.

(*a*) The question is, whether a writing published by A of B is libellous or not.

The position and relations of the parties at the time when the libel was published may be deemed to be relevant facts as introductory to the facts in issue.

The particulars of a dispute between A and B about a matter unconnected with the alleged libel are not deemed to be relevant under this article, though the fact that there was a dispute may be deemed to be relevant if it affected the relations between A and B.[1]

(*b*) The question is, whether A wrote an anonymous letter, threatening B, and requiring B to meet the writer at a certain time and place to satisfy his demands.

The fact that A met B at that time and place is deemed to be relevant, as conduct subsequent to and affected by a fact in issue.

The fact that A had a reason, unconnected with the letter, for being at that time at that place, is deemed to be relevant, as rebutting the inference suggested by his presence.[2]

(*c*) A is tried for a riot, and is proved to have marched at the head of a mob. The cries of the mob are deemed to be relevant, as explanatory of the nature of the transaction.[3]

(*d*) The question is, whether a deed was forged. It purports to be made in the reign of Philip and Mary, and enumerates King Philip's titles.

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[1] Common practice.

[2] *R.* v. *Barnard*, 1758, 19 St. Tri. 815, &c.

[3] *R.* v. *Lord George Gordon*, 1781, 21 St. Tri. 514, 515, 520, 529, 532, &c.

The fact that at the alleged date of the deed, Acts of State and other records were drawn with a different set of titles, is deemed to be relevant.[1]

(*e*) The question is, whether A poisoned B. Habits of B known to A, which would afford A an opportunity to administer the poison, are deemed to be relevant facts.[2]

(*f*) The question is, whether A made a will under undue influence. His way of life, and relations with the persons said to have influenced him unduly, are deemed to be relevant facts.[3]

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[1] *Lady Ivy's Case*, 1684, 10 St. Tri. 617, 618.

[2] *R.* v. *Donellan*, 1781, Wills Circ., Ev., 8th Ed. 380; and see my 'History of the Criminal Law,' iii. 371.

[3] *Boyse* v. *Rossborough*, 1857, 6 H. L. C. 42–58.

CHAPTER III.

OCCURRENCES SIMILAR TO BUT UNCONNECTED WITH THE FACTS IN ISSUE, IRRELEVANT EXCEPT IN CERTAIN CASES.

ARTICLE 10.*

SIMILAR BUT UNCONNECTED FACTS.

A FACT which renders the existence or non-existence of any fact in issue probable by reason of its general resemblance thereto and not by reason of its being connected therewith in any of the ways specified in articles 3–9 both inclusive, is deemed not to be relevant to such fact except in the cases specially excepted in this chapter.

Illustrations.

(*a*) The question is, whether A committed a crime.

The fact that he formerly committed another crime of the same sort, and had a tendency to commit such crimes, is deemed to be irrelevant.[1]

(*b*) The question is, whether A, a brewer, sold good beer to B, a publican. The fact that A sold good beer to C, D, and E, other publicans, is deemed to be irrelevant[2] (unless it is shown that the beer sold to all is of the same brewing).[3]

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* See Note VI.

[1] *P.* v. *Cole*, 1 Phi. Ev. 508 (said to have been decided by all the Judges in Mich. Term, 1810).

[2] *Holcombe* v. *Hewson*, 1810, 2 Camp. 391.

[3] See Illustrations to article 3.

ARTICLE 11.*

ACTS SHOWING INTENTION, GOOD FAITH, ETC.

When there is a question whether a person said or did something, the fact that he said or did something of the same sort on a different occasion may be proved if it shows the existence on the occasion in question of any intention, knowledge, good or bad faith, malice, or other state of mind or of any state of body or bodily feeling, the existence of which is in issue or is or is deemed to be relevant to the issue; or if, on the trial of a criminal charge against such person, it tends to rebut a defence otherwise open to him; but such acts or words may not be proved merely in order to show that the person so acting or speaking was likely on the occasion in question to act in a similar manner.

[1] Whenever any person is being proceeded against for receiving any property knowing it to have been stolen, or for having in his possession stolen property, for the purpose of proving guilty knowledge, the following facts are relevant:—

(*a*) the fact that other property stolen within the period of twelve months preceding the date of the offence charged was found or had been in his possession;

(*b*) the fact that within the five years preceding the date of the offence charged he was convicted of any offence involving fraud or dishonesty: provided that this last

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* See Note VI.

[1] 6 & 7 Geo. 5, c. 50, s. 42 (1). This enactment overrules to a strictly limited extent *R.* v. *Oddy*, 1851, 2 Den. C. C. 264, and practically supersedes *R.* v. *Dunn*, 1826, 1 Moo. C. C. at p. 150, and *R.* v. *Davies*, 1833, 6 C. & P. 177. See Illustrations.

mentioned fact may not be proved unless (i) seven days' notice in writing has been given to the offender that proof of such previous conviction is intended to be given, and (ii) evidence has been given that the property in respect of which the offender is being tried was found or had been in his possession.

The fact that the prisoner was within twelve months in possession of other stolen property than that to which the charge applies, is not deemed to be relevant, unless such property was found in his possession at or soon after the time when the proceedings against him were taken.[1]

Illustrations.

(*a*) A is charged with receiving two pieces of silk from B, knowing them to have been stolen by him from C.

The facts that A received from B many other articles stolen by him from C in the course of several months, and that A pledged all of them, are deemed to be relevant to the fact that A knew that the two pieces of silk were stolen by B from C.[2]

(*b*) A is charged with uttering, on the 12th December, 1854, a counterfeit crown piece, knowing it to be counterfeit.

The facts that A uttered another counterfeit crown piece on the 11th December, 1854, and a counterfeit shilling on the 4th January, 1855, are deemed to be relevant to show A's knowledge that the crown piece uttered on the 12th was counterfeit.[3]

(*c*) A is charged with attempting to obtain money by false pretences, by trying to pledge to B a worthless ring as a diamond ring.

[1] *R.* v. *Carter*, 1884, 12 Q. B. D. 522; and see *R.* v. *Drage*, 1878, 14 Cox, C. C. 85.

[2] *R.* v. *Dunn*, 1826, 1 Moo. C. C. 146.

[3] *R.* v. *Forster*, 1855, Dear. 456; and see *R.* v. *Weeks*, 1861, L. & C. 18.

The facts that two days before, A tried, on two separate occasions, to obtain money from C and D respectively, by a similar assertion as to the same or a similar ring, and that on another occasion on the same day he obtained a sum of money from E by pledging as a gold chain a chain which was only gilt, are deemed to be relevant, as showing his knowledge of the quality of the ring.[1]

(*d*) A is charged with obtaining money from B by false pretences, June 4th, 1909. The facts that on May 14th and July 3rd, 1909, A obtained goods from C and D by false pretences of a somewhat different character are deemed to be irrelevant, because they do not tend to establish the falsity of the pretences charged.[2]

(*e*) The question is whether A and B, a brother and sister, committed incest in 1910. The facts that in 1907 (before the passing of the Punishment of Incest Act) they lived together as man and wife, and that B had a child in 1908 which she registered as A's and her own, are deemed to be relevant, as tending to show that cohabitation in 1910 was not innocent association as brother and sister.[3]

(*f*) A and B were accused of demanding money in November, 1913, from the chairman of a company with menaces that they would cause the value of shares in the company to fall if the money was not paid. Evidence that they had received money from another company in the previous May after similar menaces was admitted to negative mistake or accident, and to prove a guilty mind [? intention].[4]

(*g*) The question is, whether A, the acceptor of a bill of exchange, knew that the name of the payee was fictitious.

The fact that A had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee, if the payee had been a real person, is deemed to be relevant, as showing that A knew that the payee was a fictitious person.[5]

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[1] *R.* v. *Francis*, 1874, L. R. 2 C. C. R. 128. The case of *R.* v. *Cooper*, 1875, 1 Q. B. D. (C. C. R.) 19, is similar to *R.* v. *Francis*, and perhaps stronger.

[2] *R.* v. *Fisher*, [1910], 1 K. B. 149; *R.* v. *Ellis*, [1910], 2 K. B. 746. See also *R.* v. *Ollis*, [1900], 2 Q. B. 758, and *R.* v. *Wyatt*, [1904], 1 K. B. 188.

[3] *R.* v. *Ball*, [1911], A. C. 47.

[4] *P.* v. *Boyt and Merchant*, [1914], 3 K. B. 339.

[5] *Gibson* v. *Hunter*, 1794, 2 H. Bl. 288.

(*h*) A sues B for a malicious libel. Defamatory statements made by B regarding A for ten years before those in respect of which the action is brought are deemed to be relevant to show malice.[1]

(*i*) A is charged with the murder of an infant. He contends that the infant in question was the only one that he ever took into his house, and that he parted with it lawfully.

The facts that he took charge of other infants at low prices, and that remains of infants were found concealed in several premises successively occupied by him, are deemed to be relevant.[2]

(*j*) A is sued by B for fraudulently representing to B that C was solvent, whereby B, being induced to trust C, who was insolvent, suffered loss.

The fact that, at the time when A represented C to be solvent, C was to A's knowledge supposed to be solvent by his neighbours and by persons dealing with him, is deemed to be relevant, as showing that A made the representation in good faith.[3]

(*k*) A is sued by B for the price of work done by B, by the order of C, a contractor, upon a house, of which A is owner.

A's defence is that B's contract was with C.

The fact that A paid C for the work in question is deemed to be relevant, as proving that A did, in good faith, make over to C the management of the work in question, so that C was in a position to contract with B on C's own account, and not as agent for A.[4]

(*l*) A is accused of stealing property which he had found, and the question is, whether he meant to steal it when he took possession of it.

The fact that public notice of the loss of the property had been given in the place where A was, and in such a manner that A knew or probably might have known of it, is deemed to be relevant, as showing that A did not, when he took possession of it, in good faith believe that the real owner of the property could not be found.[5]

(*m*) The question is, whether A's death was caused by poison.

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[1] *Barrett* v. *Long*, 1851, 3 H. L. C. 395, at p. 414.

[2] *Makin* v. *Attorney-General of New South Wales*, [1894], 1 Ap. Cas. 57.

[3] *Sheen* v. *Bumpstead*, 1863, 2 H. & C. 193.

[4] *Gerish* v. *Charlier*, 1845, 1 C. B. 13.

[5] This illustration is adapted from *Preston's Case*, 1851, 2 Den. C. C. 353; but the misdirection given in that case is set right. As to the relevancy of the fact, see in particular Lord Campbell's remark on p. 359.

Statements made by A before his illness as to his state of health, and during his illness as to his symptoms, are deemed to be relevant facts.[1]

(*n*) The question is, what was the state of A's health at the time when an insurance on her life was effected by B.

Statements made by A as to the state of her health at or near the time in question are deemed to be relevant facts.[2]

(*o*) A is charged with an act of gross indecency with boys on the 16th March, and sets up an alibi. Evidence that he met the same boys on the 19th March and then had in his possession a powder puff and indecent photographs is admissible to prove identity.[3]

ARTICLE 12.*

FACTS SHOWING SYSTEM.

When there is a question whether an act was accidental or intentional, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is deemed to be relevant.

Illustrations.

(*a*) A is accused of setting fire to his house in order to obtain money for which it is insured.

The facts that A had previously lived in two other houses successively, each of which he insured, in each of which a fire occurred, and that after each of those fires A received payment from a different insurance office, are deemed to be relevant, as tending to show that the fires were not accidental.[4]

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* See Note VI.

[1] *R.* v. *Palmer*, 1856. See my 'Gen. View of Crim. Law,' pp. 238, 256 (evidence of Dr. Savage and Mr. Stephens).

[2] *Aveson* v. *Lord Kinnaird*, 1805, 6 Ea. 188.

[3] *Thompson* v. *The King*, [1918], A. C. 221.

[4] *R.* v. *Gray*, 1866, 4 F. & F. 1102. I acted on this case in R. v. *Stanley*, Liverpool Summer Assizes, 1882, but I greatly doubt its authority. The objection to the admission of such evidence is that it may practically involve the trial of several distinct charges at once, as

(*b*) A is employed to pay the wages of B's labourers, and it is A's duty to make entries in a book showing the amounts paid by him. He makes an entry showing that on a particular occasion he paid more than he really did pay.

The question is, whether this false entry was accidental or intentional.

The fact that for a period of two years A made other similar false entries in the same book, the false entry being in favour of each case in A, is deemed to be relevant.[1]

(*c*) The question is, whether the administration of poison to A, by Z, his wife, in September, 1848, was accidental or intentional.

The facts that B, C, and D (A's three sons), had the same poison administered to them in December, 1848, March, 1849, and April, 1849, and that the meals of all four were prepared by Z, are deemed to be relevant, though Z was indicted separately for murdering A, B, and C, and attempting to murder D.[2]

(*d*) A promises to lend money to B on the security of a policy of insurance which B agrees to effect in an insurance company of his choosing. B pays the first premium to the company, but A refuses to lend the money except upon terms which he intends B to reject, and which B rejects accordingly.

The fact that A and the insurance company have been engaged in similar transactions is deemed to be relevant to the question whether the receipt of the money by the company was fraudulent.[3]

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it would be hard to exclude evidence to show that the other fires were accidental.—In *Makin* v. *The Attorney-General for New South Wales*, [1894], A. C. 57, decided after the author had written the foregoing note, the judgment in *R.* v. *Gray* was mentioned without disapproval in judgment of the Judicial Committee (v. *ante*, p. 19, Illustration (*j*)).

[1] *R.* v. *Richardson*, 1860, 2 F. & F. 343.

[2] *R.* v. *Geering*, 1849, 18 L. J. M. C. 215; cf. *R.* v. *Garner*, 1863, 3 F. & F. 681. See also *Makin* v. *The Attorney-General for New South Wales*, [1894], A. C. 57. The earlier cases were discussed in *R.* v. *Neill* (or *Cream*), tried at the Central Criminal Court in October, 1892, when Hawkins, J., admitted evidence of subsequent administrations of strychnine by the prisoner to persons other than and unconnected with the woman of whose murder the prisoner was then convicted. See *R.* v. *Armstrong*, [1922], 2 K. B. 193.

[3] *Blake* v. *Albion Life Assurance Society*, 1878, 4 C. P. D. 94.

ARTICLE 13.*

EXISTENCE OF COURSE OF BUSINESS WHEN DEEMED TO BE RELEVANT.

When there is a question whether a particular act was done, the existence of any course of office or business according to which it naturally would have been done, is a relevant fact.

When there is a question whether a particular person held a particular public office, the fact that he acted in that office is deemed to be relevant.[1]

When the question is whether one person acted as agent for another on a particular occasion, the fact that he so acted on other occasions is deemed to be relevant.

Illustrations.

(*a*) The question is, whether a letter was sent on a given day.

The post-mark upon it is deemed to be a relevant fact.[2]

(*b*) The question is, whether a particular letter was despatched.

The facts that all letters put in a certain place were, in the common course of business, carried to the post, and that that particular letter was put in that place, are deemed to be relevant.[3]

(*c*) The question is, whether a particular letter reached A.

The facts that it was posted in due course properly addressed, and was not returned through the Dead Letter Office, are deemed to be relevant.[4]

(*d*) The facts stated in illustration (*d*) to the last article are deemed to be relevant to the question whether A was agent to the company.[5]

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* See Note VII.

[1] Ph. Ev. 449; Roscoe's N. P. 43; Taylor, s. 171.

[2] *R.* v. *Canning*, 1754, 19 S. T. 370.

[3] *Hetherington* v. *Kemp*, 1815, 4 Camp. 193; and see *Skilbeck* v. *Garbett*, 1845, 7 Q. B. 846, and *Trotter* v. *Maclean*, 1879, 13 Ch. Div. 574.

[4] *Warren* v. *Warren*, 1834, 1 C. M. & R. 250; *Woodcock* v. *Houldsworth*, 1846, 16 M. & W. 124. Other cases on this subject are collected in Roscoe's Nisi Prius, p. 384.

[5] *Blake* v. *Albion Life Assurance Society*, 1878, 4 C. P. D. 94.

CHAPTER IV.

HEARSAY IRRELEVANT EXCEPT IN CERTAIN CASES.

ARTICLE 14.*

HEARSAY AND THE CONTENTS OF DOCUMENTS IRRELEVANT.

(*a*) THE fact that a statement was made by a person not called as a witness, and

(*b*) the fact that a statement is contained or recorded in any book, document, or record whatever, proof of which is not admissible on other grounds,

are respectively deemed to be irrelevant to the truth of the matter stated, except (as regards (*a*)) in the cases contained in the first section of this chapter;[1]

and except (as regards (*b*)) in the cases contained in the second section of this chapter.

Illustrations.

(*a*) A declaration by a deceased attesting witness to a deed that he had forged it, is deemed to be irrelevant to the question of its validity.[2]

(*b*) The question is, whether A was born at a certain time and place. The fact that a public body for a public purpose stated that he was

* See Note VIII.

[1] It is important to observe the distinction between the principles which regulate the admissibility of the statements contained in a document and those which regulate the manner in which they must be proved. On this subject see the whole of Part II.

[2] *Stobart* v. *Dryden*, 1836, 1 M. & W. 615.

born at that time and place is deemed to be irrelevant, the circumstances not being such as to bring the case within the provisions of Article 34.[1]

SECTION I.

HEARSAY WHEN RELEVANT.

ARTICLE 15.*

ADMISSION DEFINED.

An admission is a statement oral or written, suggesting any inference as to any fact in issue or relevant or deemed to be relevant to any such fact, made by or on behalf of any party to any proceeding. Every admission is (subject to the rules hereinafter stated) deemed to be a relevant fact as against the person by or on whose behalf it is made, but not in his favour unless it is or is deemed to be relevant for some other reason.

ARTICLE 16.†

WHO MAY MAKE ADMISSIONS ON BEHALF OF OTHERS, AND WHEN.

Admissions may be made on behalf of the real party to any proceeding—

By any nominal party to that proceeding;

By any person who, though not a party to the proceeding, has a substantial interest in the event:

By any one who is privy in law, in blood, or in estate to any party to the proceeding, on behalf of that party.

A statement made by a party to a proceeding may be an

* See Note IX. † See Note X.

[1] *Sturla* v. *Freccia*, 1880, 5 App. Cas. 623.

admission whenever it is made, unless it is made by a person suing or sued in a representative character only, in which case [it seems] it must be made whilst the person making it sustains that character.

A statement made by a person interested in a proceeding, or by a privy to any party thereto, is not an admission unless it is made during the continuance of the interest which entitles him to make it.

Illustrations.

(*a*) The assignee of a bond sues the obligor in the name of the obligee.

An admission on the part of the obligee that the money due has been paid is deemed to be relevant on behalf of the defendant.[1]

(*b*) An admission by the assignee of the bond in the last illustration would also be deemed to be relevant on behalf of the defendant.

(*c*) A statement made by a person before he becomes the assignee of a bankrupt is not deemed to be relevant as an admission by him in a proceeding by him as such assignee.[2]

(*d*) Statements made by a person as to a bill of which he had been the holder are deemed not to be relevant as against the holder, if they are made after he has negotiated the bill.[3]

ARTICLE 17.*

ADMISSIONS BY AGENTS AND PERSONS JOINTLY INTERESTED WITH PARTIES.

Admissions may be made by agents authorised to make them either expressly or by the conduct of their principals: but a statement made by an agent is not an admission

* See Note XI.

[1] *Hanson* v. *Parker*, 1749, 1 Wils. 257.

[2] *Fenwick* v. *Thornton*, 1827, M. & M. 51 (by Lord Tenterden). In *Smith* v. *Morgan*, 1839, 2 M. & R. 257, Tindal, C. J., decided exactly the reverse.

[3] *Pocock* v. *Billing*, 1824, 2 Bing. 269.

merely because if made by the principal himself it would have been one.

A report made by an agent to a principal is not an admission which can be proved by a third person.[1]

Partners and joint contractors are each other's agents for the purpose of making admissions against each other in relation to partnership transactions or joint contracts.

Barristers and solicitors are the agents of their clients for the purpose of making admissions whilst engaged in the actual management of the cause, either in court or in correspondence relating thereto; but statements made by a barrister or solicitor on other occasions are not admissions merely because they would be admissions if made by the client himself.

The fact that two persons have a common interest in the same subject-matter does not entitle them to make admissions respecting it as against each other.

In cases in which actions founded on a simple contract have been barred by the Statute of Limitations no joint contractor or his personal representative loses the benefit of such statute, by reason only of any written acknowledgment or promise made or signed by [or by the agent duly authorised to make such acknowledgment or promise of] any other or others of them [or by reason only of payment of any principal, interest, or other money, by any other or others of them].[2]

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[1] *Re Devala Company*, 1883, 22 Ch. Div. 593.

[2] 9 Geo. IV. c. 14, s. 1. The words in the first set of brackets were added by 19 & 20 Vict. c. 97, s. 13. The words in the second set by s. 14 of the same Act. The language is slightly altered.

A principal, as such, is not the agent of his surety for the purpose of making admissions as to the matters for which the surety gives security.

Illustrations.

(*a*) The question is, whether a parcel, for the loss of which a Railway Company is sued, was stolen by one of their servants. Statements made by the station-master to a police officer, suggesting that the parcel had been stolen by a porter, are deemed to be relevant, as against the railway, as admission by an agent.[1]

(*b*) A allows his wife to carry on the business of his shop in his absence. A statement by her that he owes money for goods supplied to the shop is deemed to be relevant against him as an admission by an agent.[2]

(*c*) A sends his servant, B, to sell a horse. What B says at the time of the sale, and as part of the contract of sale, is deemed to be a relevant fact as against A, but what B says upon the subject at some different time is not deemed to be relevant as against A[3] [though it might have been deemed to be relevant if said by A himself].

(*d*) The question is, whether a ship remained at a port for an unreasonable time. Letters from the plaintiff's agent to the plaintiff containing statements which would have been admissions if made by the plaintiff himself, are deemed to be irrelevant as against him.[4]

(*e*) A, B, and C sue D as partners upon an alleged contract respecting the shipment of bark. An admission by A that the bark was his exclusive property and not the property of the firm is deemed to be relevant as against B and C.[5]

(*f*) A, B, C, and D make a joint and several promissory note. Either can make admissions about it as against the rest.[6]

(*g*) The question is, whether A accepted a bill of exchange. A notice to produce the bill signed by A's solicitor and describing the bill as having been accepted by A is deemed to be a relevant fact.[7]

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[1] *Kirkstall Brewery* v. *Furness Ry.*, 1874, L. R. 9 Q. B. 468.
[2] *Clifford* v. *Burton*, 1823, 1 Bing. 199.
[3] *Helyear* v. *Hawke*, 1803, 5 Esp. 72.
[4] *Langhorn* v. *Allnutt*, 1812, 4 Tau. 511.
[5] *Lucas* v. *De La Cour*, 1813, 1 M. & S. 249.
[6] *Whitcomb* v. *Whitting*, 1781, 1 S. L. C. 649.
[7] *Holt* v. *Squire*, 1825, Ry. & Mo. 282.

(*h*) The question is, whether a debt to A, the plaintiff, was due from B, the defendant, or from C. A statement made by A's solicitor to B's solicitor in common conversation that the debt was due from C is deemed not to be relevant against A.[1]

(*i*) One co-part-owner of a ship cannot, as such, make admissions against another as to the part of the ship in which they have a common interest, even if he is co-partner with that other as to other parts of the ship.[2]

(*j*) A is surety for B, a clerk. B being dismissed makes statements as to sums of money which he has received and not accounted for. These statements are not deemed to be relevant as against A, as admissions.[3]

ARTICLE 18.*

ADMISSION BY STRANGERS.

Statements by strangers to a proceeding are not relevant as against the parties except in the cases hereinafter mentioned.[4]

In actions against sheriffs for not executing process against debtors, statements of the debtor admitting his debt to be due to the execution creditor are deemed to be relevant as against the sheriff.[5]

In actions by the trustees of bankrupts an admission by the bankrupt of the petitioning creditor's debt is deemed to be relevant as against the plaintiff.[6]

* See Note XII.

[1] *Petch* v. *Lyon*, 1846, 9 Q. B. 147.

[2] *Jaggers* v. *Binnings*, 1815, 1 Star. 64.

[3] *Smith* v. *Whippingham*, 1833, 6 C. and P. 78. See also *Evans* v. *Beattie*, 1803, 5 Esp. 26; *Bacon* v. *Chesney*, 1816, 1 Star. 192; *Caermarthen R. C.* v. *Manchester R. C.*, 1873, L. R. 8 C. P. 685.

[4] *Coole* v. *Braham*, 1848, 3 Ex. 183. For a third exception, which could hardly occur now, see *Clay* v. *Langslow*, 1827, M. & M. 45.

[5] *Kempland* v. *Macauley*, 1791, Peake, 95; *Williams* v. *Bridges*, 1817, 2 Star. 42.

[6] *Jarrett* v. *Leonard*, 1814, 2 M. & S. 265 (adapted to the new law of bankruptcy).

ARTICLE 19.*

ADMISSION BY PERSON REFERRED TO BY PARTY.

When a party to any proceeding expressly refers to any other person for information in reference to a matter in dispute, the statements of that other person may be admissions as against the person who refers to him.

Illustration.

The question is, whether A delivered goods to B. B says "if C" (the carman) "will say that he delivered the goods, I will pay for them." C's answer may as against B be an admission.[1]

ARTICLE 20.†

ADMISSIONS MADE WITHOUT PREJUDICE.

No admission is deemed to be relevant in any civil action if it is made either upon an express condition that evidence of it is not to be given,[2] or under circumstances from which the judge infers that the parties agreed together that evidence of it should not be given,[3] or if it was made under duress.[4]

ARTICLE 21.

CONFESSIONS DEFINED.

A confession is an admission made at any time by a person charged with a crime, stating or suggesting the

* See Note XIII. † See Note XIV.

[1] *Daniel* v. *Pitt*, 1808, 1 Camp. 366, n. See, too, *R.* v. *Mallory*, 1884, 13 Q. B. D. 33. This is a weaker illustration than *Daniel* v. *Pitt*.

[2] *Cory* v. *Bretton*, 1830, 4 C. & P. 462.

[3] *Paddock* v. *Forester*, 1842, 3 M. & G. 903.

[4] *Stockfleth* v. *De Tastet*, 1814, *per* Ellenborough, C. J., 4 Camp. 10.

inference, that he committed that crime. Confessions, if voluntary, are deemed to be relevant facts as against the persons who make them only.

ARTICLE 22.*

CONFESSIONS CAUSED BY INDUCEMENT, THREAT, OR PROMISE, WHEN IRRELEVANT IN CRIMINAL PROCEEDING.

No confession is deemed to be voluntary if it appears to the judge to have been caused by any inducement, threat, or promise, proceeding from a person in authority, and having reference to the charge against the accused person, whether addressed to him directly or brought to his knowledge indirectly;

and if (in the opinion of the judge)[1] such inducement,

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* See Note XV.

[1] It is not easy to reconcile the cases on this subject. In *R.* v. *Baldry*, 1852, 2 Den. 430, the constable told the prisoner that he need not say anything to criminate himself, but that what he did say would be taken down and used as evidence against him. It was held that this was not an inducement, though there were earlier cases which treated it as such. In *R.* v. *Jarvis*, 1867, 1 C. C. R. 96, the following was held not to be an inducement: "I think it is right I should tell you that besides being in the presence of my brother and myself" (prisoner's master), "you are in the presence of two officers of the police, and I should advise you that to any question that may be put to you, you will answer truthfully, so that if you have committed a fault you may not add to it by stating what is untrue. Take care. We know more than you think we know.—So you had better be good boys and tell the truth." On the other hand, in *R.* v. *Reeve*, 1872, 1 C. C. R. 364, the words, "You had better, as good boys, tell the truth:" in *R.* v. *Fennell*, 1881, 7 Q. B. D. 147, "The inspector tells me you are making housebreaking implements; if that is so, you had better tell the truth, it may be better for you," were held to exclude the confession which followed. There are later cases (unreported) which follow these.

threat, or promise, gave the accused person reasonable grounds for supposing that by making a confession he would gain some advantage or avoid some evil in reference to the proceedings against him.

A confession is not involuntary, only because it appears to have been caused by the exhortations of a person in authority to make it as a matter of religious duty, or by an inducement collateral to the proceeding, or by inducements held out by a person not in authority.

The prosecutor, officers of justice having the prisoner in custody, magistrates, and other persons in similar positions, are persons in authority. The master of the prisoner is not as such a person in authority if the crime of which the person making the confession is accused was not committed against him.

A confession is deemed to be voluntary if (in the opinion of the judge) it is shown to have been made after the complete removal of the impression produced by any inducement, threat, or promise which would otherwise render it involuntary.

Before a confession can be treated as relevant in a criminal trial it must be proved affirmatively that it was free and voluntary.[1]

Facts discovered in consequence of confessions improperly obtained, and so much of such confessions as distinctly relate to such facts, may be proved.

[1] *R.* v. *Thompson*, [1893], 2 Q. B. 12. The early authorities on the admission of confessions are summed up in this case by Cave, J., who describes a "free and voluntary statement," as one which was not "preceded by any inducement to make a statement held out by a person in authority."

Illustrations.

(*a*) The question is, whether A murdered B.

A handbill issued by the Secretary of State, promising a reward and pardon to any accomplice who would confess, is brought to the knowledge of A, who, under the influence of the hope of pardon, makes a confession. This confession is not voluntary.[1]

(*b*) A being charged with the murder of B, the chaplain of the gaol reads the Commination Service to A, and exhorts him upon religious grounds to confess his sins. A, in consequence, makes a confession. This confession is voluntary.[2]

(*c*) The gaoler promises to allow A, who is accused of a crime, to see his wife, if he will tell where the property is. A does so. This is a voluntary confession.[3]

(*d*) A is accused of child murder. Her mistress holds out an inducement to her to confess, and she makes a confession. This is a voluntary confession, because her mistress is not a person in authority.[4]

(*e*) A is accused of the murder of B. C, a magistrate, tries to induce A to confess by promising to try to get him a pardon if he does so. The Secretary of State informs C that no pardon can be granted, and this is communicated to A. After that A makes a statement. This is a voluntary confession.[5]

(*f*) A, accused of burglary, makes a confession to a policeman under an inducement which prevents it from being voluntary. Part of it is that A had thrown a lantern into a certain pond. The fact that he said so, and that the lantern was found in the pond in consequence, may be proved.[6]

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[1] *R.* v. *Boswell*, 1842, Car. & Marsh. 584.

[2] *R.* v. *Gilham*, 1828, 1 Moo. C. C. 186. In this case the exhortation was that the accused man should confess "to God," but it seems from parts of the case that he was urged also to confess to man "to repair any injury done to the laws of his country." According to the practice at that time, no reasons are given for the judgment. The principle seems to be that a man is not likely to tell a falsehood in such cases, from religious motives. The case is sometimes cited as an authority for the proposition that a clergyman may be compelled to reveal confessions made to him professionally. It has nothing to do with the subject.

[3] *R.* v. *Lloyd*, 1834, 6 C. & P. 393.

[4] *R.* v. *Moore*, 1852, 2 Den. C. C. 522.

[5] *R.* v. *Clewes*, 1830, 4 C. & P. 221.

[6] *R.* v. *Gould*, 1840, 9 C. & P. 364. This is not consistent, so far as the proof of the words goes, with *R.* v. *Warwickshall*, 1783, 1 Leach, 263.

ARTICLE 23.*

CONFESSIONS MADE UPON OATH, ETC.

Evidence amounting to a confession may be used as such against the person who gives it, although it was given upon oath, and although the proceeding in which it was given had reference to the same subject-matter as the proceeding in which it is to be proved, and although the witness might have refused to answer the questions put to him; but if, after refusing to answer any such question, the witness is improperly compelled to answer it, his answer is not a voluntary confession.[1]

Illustrations.

(*a*) The answers given by a bankrupt in his examination may be used against him in a prosecution for offences against the law of bankruptcy.[2]

(*b*) A is charged with maliciously wounding B.

Before the magistrates A appeared as a witness for C, who was charged with the same offence. A's deposition may be used against him on his own trial.[3]

ARTICLE 24.

CONFESSION MADE UNDER A PROMISE OF SECRECY.

If a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the

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* See Note XVI.

[1] *R.* v. *Garbett*, 1847, 1 Den. 236. See also *R.* v. *Owen*, 1888, 20 Q. B. D. 829, as explained in *R.* v. *Paul*, 1890, 25 Q. B. D. 202.

[2] *R.* v. *Scott*, 1856, 1 D. & B. 47; 25 L. J. M. C. 128; *R.* v. *Robinson*, 1867, 1 C. C. R. 80; *R.* v. *Widdop*, 1872, L. R. 2 C. C. 5; *R.* v. *Erdheim*, [1896], 2 Q. B. 260.

[3] *R.* v. *Childley & Cummins*, 1860, 8 Cox, C. C. 365.

accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.[1]

ARTICLE 25.

STATEMENTS BY DECEASED PERSONS WHEN DEEMED TO BE RELEVANT.

Statements written or oral of facts in issue or relevant or deemed to be relevant to the issue are deemed to be relevant, if the person who made the statement is dead, in the cases, and on the conditions, specified in Articles 26–31, both inclusive. In each of those articles the word "declaration" means such a statement as is herein mentioned, and the word "declarant" means a dead person by whom such a statement was made in his lifetime.

ARTICLE 26.*

DYING DECLARATION AS TO CAUSE OF DEATH.

A declaration made by the declarant as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, is deemed to be relevant

only in trials for the murder or manslaughter of the declarant;

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* See Note XVII.

[1] Cases collected and referred to in 1 Ph. Ev. 420, and Taylor, 881. See, too, Joy, sections iii., iv., v.

and only when the declarant is shown, to the satisfaction of the judge, to have been in actual danger of death, and to have given up all hope of recovery at the time when his declaration was made.

Such a declaration is not irrelevant merely because it was intended to be made as a deposition before a magistrate, but is irregular.

Illustrations.

(*a*) The question is, whether A has murdered B.

B makes a statement to the effect that A murdered him.

B at the time of making the statement has no hope of recovery, though his doctor had such hopes, and B lives ten days after making the statement. The statement is deemed to be relevant.[1]

B, at the time of making the statement (which is written down), says something, which is taken down thus: "I make the above statement with the fear of death before me, and with no hope of recovery." B, on the statement being read over, corrects this to "with no hope *at present* of my recovery." B dies thirteen hours afterwards. The statement is deemed to be irrelevant.[2]

(*b*) The question is, whether A administered drugs to a woman with intent to procure abortion. The woman makes a statement which would have been admissible had A been on his trial for murder. The statement is deemed to be irrelevant.[3]

(*c*) The question is, whether A murdered B. A dying declaration by C that he (C) murdered B is deemed to be irrelevant.[4]

(*d*) The question is, whether A murdered B.

B makes a statement before a magistrate on oath, and makes her mark to it, and the magistrate signs it, but not in the presence of A, so that her statement was not a deposition within the statute then in force. B, at the time when the statement was made, was in a dying state, and had no hope of recovery. The statement is deemed to be relevant.[5]

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[1] *R.* v. *Mosley*, 1825, 1 Moo. 97.

[2] *R.* v. *Jenkins*, 1869, 1 C. C. R. 187. See also *R.* v. *Perry*, [1909], 2 K. B. 697.

[3] *R.* v. *Hind*, 1860, Bell, 253, following *R.* v. *Hutchinson*, 1824, 2 B. & C. 608 n., quoted in a note to *R.* v. *Mead*.

[4] *Gray's Case*, 1841, Ir. Cir. Rep. 76.

[5] *R.* v. *Woodcock*, 1789, 1 East, P. C. 356. In this case, Eyre, C.B.,

ARTICLE 27.*

DECLARATIONS MADE IN THE COURSE OF BUSINESS OR PROFESSIONAL DUTY.

A declaration is deemed to be relevant when it was made by the declarant in the ordinary course of business, and in the discharge of professional duty, at or near the time when the matter stated occurred,[1] and of his own knowledge.

Such declarations are deemed to be irrelevant except so far as they relate to the matter which the declarant stated in the ordinary course of his business or duty, or if they do not appear to be made by a person duly authorised to make them.

Illustrations.

(*a*) The question is, whether A delivered certain beer to B.

The fact that a deceased drayman of A's on the evening of the delivery, made an entry to that effect in a book kept for the purpose, in the ordinary course of business, is deemed to be relevant.[2]

(*b*) The question is, what were the contents of a letter not produced after notice.

A copy entered immediately after the letter was written, in a book kept for that purpose, by a deceased clerk, is deemed to be relevant.[3]

(*c*) The question is, whether A was arrested at Paddington, or in South Molton Street.

A certificate annexed to the writ by a deceased sheriff's officer, and returned by him to the sheriff, is deemed to be relevant so far as it relates to the fact of the arrest; but irrelevant so far as it relates to the place where the arrest took place.[4]

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* See Note XVIII.

is said to have left to the jury the question, whether the deceased was not in fact under the apprehension of death. 1 Leach, 504. It is now settled that the question is for the judge.

[1] *Doe* v. *Turford*, 1832, 3 B. & Ad. 890.

[2] *Price* v. *Torrington*, 1703, 2 Smith's L. C. 294.

[3] *Pritt* v. *Fairclough*, 1812, 3 Camp. 305.

[4] *Chambers* v. *Bernasconi*, 1834, 1 C. M. & R. 347; see, too, *Smith* v. *Blakey*, 1867, L. R. 2 Q. B. 326.

(*d*) The course of business was for A, a workman in a coal-pit, to tell B, the foreman, what coals were sold, and for B (who could not write) to get C to make entries in a book accordingly.

The entries (A and B being dead) are deemed to be irrelevant, because B, for whom they were made, did not know them to be true.[1]

(*e*) The question is, what is A's age. A statement by the incumbent in a register of baptisms that he was baptised on a given day is deemed to be relevant. A statement in the same register that he was born on a given day is deemed to be irrelevant, because it was not the incumbent's duty to make it.[2]

(*f*) The question is, whether A was married. Proceedings in a college book, which ought to have been but was not signed by the registrar of the college, were held to be irrelevant.[3]

ARTICLE 28.*

DECLARATIONS AGAINST INTEREST.

A declaration is deemed to be relevant if the declarant had peculiar means of knowing the matter stated, if he had no interest to misrepresent it, and if it was opposed to his pecuniary or proprietary interest.[4] The whole of any such declaration, and of any other statement referred to in it, is deemed to be relevant, although matters may be stated which were not against the pecuniary or proprietary interest of the declarant; but statements, not referred to in, or necessary to explain such declarations, are not deemed to be relevant merely because they were made at the same time or recorded in the same place.[5]

* See Note XIX.

[1] *Brain* v. *Preece*, 1843, 11 M. & W. 773.

[2] *R.* v. *Clapham*, 1829, 4 C. & P. 29.

[3] *Fox* v. *Bearblock*, 1881, 17 Ch. Div. 429.

[4] These are almost the exact words of Bayley, J., in *Gleadow* v. *Atkin*, 1833, 1 Cromp. & M. at p. 423. The interest must not be too remote: *Smith* v. *Blakey*, 1867, L. R. 2 Q. B. 326.

[5] Illustrations (*a*) (*b*) and (*c*).

A declaration may be against the pecuniary interest of the person who makes it, if part of it charges him with a liability, though other parts of the book or document in which it occurs may discharge him from such liability in whole or in part, and [it seems] though there may be no proof other than the statement itself either of such liability or of its discharge in whole or part.[1]

A statement made by a declarant holding a limited interest in any property and opposed to such interest is deemed to be relevant only as against those who claim under him, and not as against the reversioner.[2]

An endorsement or memorandum of a payment made upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment was made, is not sufficient proof of such payment to take the case out of the operation of the Statutes of Limitation;[3] but any such declaration made in any other form by or by the direction of the person to whom the payment was made is, when such person is dead, sufficient proof for the purpose aforesaid.[4]

Any indorsement or memorandum to the effect above mentioned made upon any bond or other specialty by a

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[1] Illustrations (*d*) and (*e*).

[2] Illustration (*g*); see Lord Campbell's judgment in case there quoted, at p. 177.

[3] 9 Geo. IV. c. 14, s. 3.

[4] *Bradley* v. *James*, 1853, 13 C. B. 822. *Newbould* v. *Smith*, 1885, 29 Ch. Div. 882, seems scarcely consistent with this. It was a decision of North, J. On appeal, 1886, 33 Ch. Div. 127, the Court expressed no opinion on the admissibility of the entry rejected by North, J.; and see, too, the appeal to the House of Lords, 1889, 14 App. Ca. 423, where the same was the case.

deceased person, is regarded as a declaration against the proprietary interest of the declarant for the purpose above mentioned, if it is shown to have been made at the time when it purports to have been made;[1] but it is uncertain whether the date of such indorsement or memorandum may be presumed to be correct without independent evidence.[2]

Statements of relevant facts opposed to any other than the pecuniary or proprietary interest of the declarant are not deemed to be relevant as such.[3]

Illustrations.

(*a*) The question is, whether a person was born on a particular day. An entry in the book of a deceased man-midwife in these words is deemed to be relevant:[4]

"W. Fowden, Junr.'s wife,
Filius circa hor. 3 post merid. natus H.
W. Fowden, Junr.,
App. 22, filius natus,
Wife, £1 6*s.* 1*d.*,
Pd. 25 Oct., 1768."

(*b*) The question is, whether a certain custom exists in a part of a parish.

The following entries in the parish books, signed by deceased churchwardens, are deemed to be relevant:—

"It is our ancient custom thus to proportion church-lay. The chapelry of Haworth pay one-fifth, &c."

Followed by—

"Received of Haworth, who this year disputed this our ancient

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[1] 3 & 4 Will. IV. c. 42, which is the Statute of Limitations relating to Specialties, has no provision similar to 9 Geo. IV. c. 14, s. 3. Hence, in this case the ordinary rule is unaltered.

[2] See the question discussed in 2 Ph. Ev. 302–305, and Taylor, ss. 692–696; and see Article 85.

[3] Illustration (*h*).

[4] *Higham* v. *Ridgway*, 2 Smith's L. C. 301.

custom, but after we had sued him, paid it accordingly—£8, and £1 for costs."[1]

(*c*) The question is, whether a gate on certain land, the property of which is in dispute, was repaired by A.

An account by a deceased steward, in which he charges A with the expense of repairing the gate is deemed to be irrelevant, though it would have been deemed to be relevant if it had appeared that A admitted the charge.[2]

(*d*) The question is, whether A received rent for certain land.

A deceased steward's account, charging himself with the receipt of such rent for A, is deemed to be relevant, although the balance of the whole account is in favour of the steward.[3]

(*e*) The question is, whether certain repairs were done at A's expense.

A bill for doing them, receipted by a deceased carpenter, is deemed to be {relevant[4] / irrelevant[5]} there being no other evidence either that the repairs were done or that the money was paid.

(*f*) The question is, whether A (deceased) gained a settlement in the parish of B by renting a tenement.

A statement made by A, whilst in possession of a house, that he had paid rent for it, is deemed to be relevant, because it reduces the interest which would otherwise be inferred from the fact of A's possession.[6]

(*g*) The question is, whether there is a right of common over a certain field.

A statement by A, a deceased tenant for a term of the land in question, that he had no such right, is deemed to be relevant as against his successors in the term, but not as against the owner of the field.[7]

(*h*) The question is, whether A was lawfully married to B.

A statement by a deceased clergyman that he performed the marriage under circumstances which would have rendered him liable to a criminal prosecution, is not deemed to be relevant as a statement against interest.[8]

(*i*) The question is whether the posthumous illegitimate child of A is entitled to compensation for the death of his father under the Workmen's Compensation Act.

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[1] *Stead* v. *Heaton*, 1792, 4 T. R. 669.
[2] *Doe* v. *Beviss*, 1849, 7 C. B. 456.
[3] *Williams* v. *Graves*, 1838, 8 C. & P. 592.
[4] *R.* v. *Lower Heyford*, 1840, note to *Higham* v. *Ridgway*, 1808, 2 Smith's L. C. 301.
[5] *Doe* v. *Vowles*, 1833, 1 Mo. & Ro. 261. In *Taylor* v. *Witham*, 1876, 3 Ch. Div. 605, Jessel, M.R., followed *R.* v. *Lower Heyford*, and dissented from *Doe* v. *Vowles*.
[6] *R.* v. *Exeter*, 1869, L. R. 4 Q. B. 341.
[7] *Papendick* v. *Bridgewater*, 1855, 5 E. & B. 166.
[8] *Sussex Peerage Case*, 1844, 11 C. & F. at p. 108.

Statements by A to the effect that he was the father of the child and intended to marry the mother before its birth and to support the child are not deemed to be relevant as being against A's interest.[1]

ARTICLE 29.

DECLARATIONS BY TESTATORS AS TO CONTENTS OF WILL.

The declarations of a deceased testator as to his testamentary intentions, and as to the contents of his will, are deemed to be relevant

when his will has been lost, and when there is a question as to what were its contents; and

when the question is whether an existing will is genuine or was improperly obtained; and

when the question is whether any and which of more existing documents than one constitute his will.

In all these cases it is immaterial whether the declarations were made before or after the making or loss of the will.[2]

ARTICLE 30.[3]

DECLARATIONS AS TO PUBLIC AND GENERAL RIGHTS.

Declarations are deemed to be relevant (subject to the third condition mentioned in the next article) when they

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[1] *Lloyd* v. *Powell Duffryn Coal Co.* [1913] 2 K. B. 130. The statements are summarised as favourably as possible to the view that they were against interest. The decision was reversed by the House of Lords [1914] A. C. 733, where it was argued and decided on other grounds. See note 2 to Art. 31, p. 44.

[2] *Sugden* v. *St. Leonards*, 1876, L. R. 1 P. D. (C. A.) 154: and see *Gould* v. *Lakes*, 1880, L. R. 6 P. D. 1. In questions between the heir and the legatee or devisor such statements would probably be relevant as admissions by a privy in law, estate, or blood. *Gould* v. *Lakes*, 1880, L. R. 6 P. D. 1; *Doe* v. *Palmer*, 1851, 16 Q. B. 747. The decision in this case at p. 757, followed by *Quick* v. *Quick*, 1864, 3 Sw. & Tr. 442, is overruled by *Sugden* v. *St. Leonards*.

[3] See Note XX. Also see *Weeks* v. *Sparke*, 1813, 1 M. & S. 679; *Crease* v. *Barrett*, 1835, 1 C. M. & R. 919. Article 5 has much in

relate to the existence of any public or general right or custom or matter of public or general interest. But declarations as to particular facts from which the existence of any such public or general right or custom or matter of public or general interest may be inferred, are deemed to be irrelevant.

A right is public if it is common to all His Majesty's subjects, and declarations as to public rights are relevant whoever made them.

A right or custom is general if it is common to any considerable number of persons, as the inhabitants of a parish, or the tenants of a manor.

Declarations as to general rights are deemed to be relevant only when they were made by persons who are shown, to the satisfaction of the judge, or who appear from the circumstances of their statement, to have had competent means of knowledge.

Such declarations may be made in any form and manner.

Illustrations.

(*a*) The question is, whether a road is public.

A statement by A (deceased) that it is public is deemed to be relevant.[1]

A statement by A (deceased) that he planted a willow (still standing) to show where the boundary of the road had been when he was a boy is deemed to be irrelevant.[2]

(*b*) The following are instances of the manner in which declarations as to matters of public and general interest may be made:—They may be made in

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common with this article. Lord Blackburn's judgment in *Neill* v. *Duke of Devonshire*, 1882, L. R. 8 App. Ca., pp. 186, 187, especially explains the law.

[1] *Crease* v. *Barrett*, per Parke, B., 1835, 1 C. M & R. at p. 929.

[2] *R.* v. *Bliss*, 1835, 7 A. & E. 550.

Maps prepared by or by the direction of persons interested in the matter ;[1]

Copies of Court rolls ;[2]

Deeds and leases between private persons ;[3]

Verdicts, judgments, decrees, and orders of Courts, and similar bodies[4] if final.[5]

ARTICLE 31.*

DECLARATIONS AS TO PEDIGREE.

A declaration is deemed to be relevant (subject to the conditions hereinafter mentioned) if it relates to the existence of any relationship between persons, whether living or dead, or to the birth, marriage, or death of any person, by which such relationship was constituted, or to the time or place at which any such fact occurred, or to any fact immediately connected with its occurrence.[6]

Such declarations may express either the personal knowledge of the declarant, or information given to him by other persons qualified to be declarants, but not information collected by him from persons not qualified to be declarants.[7] They may be made in any form and in any document or upon anything in which statements as to relationship are commonly made.[8]

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* See Note XXI.

[1] Implied in *Hammond* v. *Bradstreet*, 1854, 10 Ex. 390, and *Pipe* v. *Fulcher*, 1858, 1 E. & E. 111. In each of these cases the map was rejected as not properly qualified.

[2] *Crease* v. *Barrett*, 1835, 1 C. M. & R. at p. 928.

[3] *Plaxton* v. *Dare*, 1829, 10 B. & C. 17.

[4] *Duke of Newcastle* v. *Broxtowe*, 1832, 4 B. & Ad. 273.

[5] *Pim* v. *Currell*, 1840, 6 M. & W. 234, 266.

[6] Illustration (*a*).

[7] *Davies* v. *Lowndes*, 1843, 6 M. & G. at p. 527.

[8] Illustration (*d*).

The conditions above referred to are as follows:—

(1) Such declarations are deemed to be relevant only in cases in which the pedigree to which they relate is in issue, and not to cases in which it is only relevant to the issue;[1]

(2) They must be made by a declarant shown to be legitimately related by blood to the person to whom they relate; or by the husband or wife of such a person.[2]

(3) They must be made before the question in relation to which they are to be proved has arisen; but they do not cease to be deemed to be relevant because they were made for the purpose of preventing the question from arising.[3]

This condition applies also to statements as to public and general rights or customs and matters of public and general interest.

Illustrations.

(*a*) The question is, which of three sons (Fortunatus, Stephanus, and Achaicus) born at a birth is the eldest.

The fact that the father said that Achaicus was the youngest, and he

[1] Illustration (*b*).

[2] *Shrewsbury Peerage Case*, 1857, 7 H. L. C. 26. For Scot h law, see *Lauderdale Peerage Case*, 1885, L. R. 10 App. Ca. 692; also *Lovat Peerage Case*, 1885, *ib.* 763. In *In re Turner*, *Glenister* v *Harding*, 1885, 29 Ch. Div. 985, a declaration by a deceased reputed father of his daughter's illegitimacy was admitted on grounds not very clear to me: and on the authority of two Nisi Prius Cases, *Morris* v. *Davies*, 1825, 3 C. & P. 215, and *Cope* v. *Cope*, 1833, 1 Mo. & Ro. 269. Statements by a dead man admitting his paternity of an unborn child and indicating his intention to marry the mother were held admissible under the Workmen's Compensation Act, 1906, to prove paternity and dependency by creating a reasonable anticipation that the child would be supported by the father: *Lloyd* v. *Powell Duffryn Coal Co.*, [1914], A. C. 733, and see [1913] 2 K. B. 130. But this was not treated as a pedigree case. See note to Article 34.

[3] *Berkeley Peerage Case*, 1811, 4 Cam. 401-417; and see *Lovat Peerage*, 1885, 10 App. Ca. 797.

[4] Vin. Abr., 1731, *tit.* Evidence, T. b. 91. The report calls the son Achicus.

took their names from St. Paul's Epistles (see 1 Cor. xvi. 17), and the fact that a relation present at the birth said that she tied a string round the second child's arm to distinguish it, are relevant.[1]

(*b*) The question is, whether A, sued for the price of horses and pleading infancy, was on a given day an infant or not.

The fact that his father stated in an affidavit in a Chancery suit to which the plaintiff was not a party, that A was born on a certain day, is irrelevant.[1]

(*c*) The question is, whether one of the *cestuis que vie* in a lease for lives is living.

The fact that he was believed in his family to be dead is deemed to be irrelevant, as the question is not one of pedigree.[2]

(*d*) The following are instances of the ways in which statements as to pedigree may be made: By family conduct or correspondence; in books used as family registers; in deeds and wills; in inscriptions on tombstones, or portraits; in pedigrees, so far as they state the relationship of living persons known to the compiler.[3]

ARTICLE 32.*

EVIDENCE GIVEN IN FORMER PROCEEDINGS WHEN RELEVANT.

Evidence given by a witness in a previous action is relevant for the purpose of proving the matter stated in a subsequent proceeding, or in a later stage of the same proceeding, when the witness is dead,[4] or is mad,[5] or so ill that he will probably never be able to travel,[6] or is kept out of the way by the adverse party,[7] or in civil, but not, it seems,

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* See Note XXII.

[1] *Guthrie* v. *Haines*, 1884, 13 Q. B. D. 818. In this case all the authorities on this point are fully considered.

[2] *Whittuck* v. *Walters*, 1830, 4 C. & P. 375.

[3] In 1 Ph. Ev. 203–215; Taylor, ss. 648–652; and Roscoe's N. P. 44–46, these and many other forms of statement of the same sort are mentioned; and see *Davies* v. *Lowndes*, 1843, 6 M. & G. at pp. 526, 527.

[4] *Mayor of Doncaster* v. *Day*, 1810, 3 Tau. 262.

[5] *R.* v. *Eriswell*, 1790, 3 T. R. 720.

[6] *R.* v. *Hogg*, 1833, 6 C. & P. 176.

[7] *R.* v. *Scaife*, 1851, 17 Q. B. 238, 243.

in criminal, cases, is out of the jurisdiction of the Court,[1] or perhaps, in civil, but not in criminal, cases, when he cannot be found.[2]

Provided in all cases—

(1) That the person against whom the evidence is to be given had the right and opportunity to cross-examine the declarant when he was examined as a witness;[3]

(2) That the questions in issue were substantially the same in the first as in the second proceeding;[3]

Provided also—

(3) That the proceeding, if civil, was between the same parties or their representatives in interest;[3]

(4) That, in criminal cases, the same person is accused upon the same facts.[4]

If evidence is reduced to the form of a deposition, the provisions of Article 90 apply to the proof of the fact that it was given.

The conditions under which depositions may be used as evidence are stated in Articles 140–142.

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[1] *Fry* v. *Wood*, 1737, 1 Atk. 444; *R.* v. *Scaife*, 1851, 17 Q. B. at p. 243.

[2] Godbolt, 1623, p. 326, case 418; *R.* v. *Scaife*, 1851, 17 Q. B. at p. 243.

[3] *Doe* v. *Tatham*, 1834, 1 A. & E. 3, 19; *Doe* v. *Derby*, 1834, 1 A. & E. 783, 785, 789. See, as a late illustration, as to privies in estate, *Llanover* v. *Homfray*, 1880, 19 Ch. Div. 224. In this case the first set of proceedings was between lords of the same manor and tenants of the same manor as the parties to the second suit.

[4] *Beeston's Case*, 1854, Dears. 405.

SECTION II.

STATEMENTS IN BOOKS, DOCUMENTS, AND RECORDS, WHEN RELEVANT.

ARTICLE 33.

RECITALS OF PUBLIC FACTS IN STATUTES AND PROCLAMATIONS.

When any act of state or any fact of a public nature is in issue or is or is deemed to be relevant to the issue, any statement of it made in a recital contained in any public Act of Parliament, or in any Royal proclamation or speech of the Sovereign in opening Parliament, or in any address to the Crown of either House of Parliament, is deemed to be a relevant fact.[1]

ARTICLE 34.

RELEVANCY OF ENTRY IN PUBLIC RECORD MADE IN PERFORMANCE OF DUTY.

An entry in any record, official book, or register kept in any of His Majesty's dominions or at sea, or in any foreign country, stating, for the purpose of being referred to by the public, a fact in issue or relevant or deemed to be relevant thereto, and made in proper time by any person in the discharge of any duty imposed upon him by the law of the place in which such record, book, or register is kept, is itself deemed to be a relevant fact.[2]

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[1] *R.* v. *Francklin*, 1731, 17 S. T. at p. 636, *et seq.*; *R.* v. *Sutton*, 1816, 4 M. & S. 532.

[2] *Sturla* v. *Freccia*, 1880, 5 App. Ca. 623; see especially, pp. 633-4, and 643-5; *Lyell* v. *Kennedy*, 1889, 14 App. Ca. 437; Taylor, ss. 1591-1595. See also *Queen's Proctor* v. *Fry*, 1879, 4 P. D. 230. In

ARTICLE 35.

RELEVANCY OF STATEMENTS IN WORKS OF HISTORY, MAPS, CHARTS, AND PLANS.

Statements as to matters of general public history made in accredited historical books are deemed to be relevant when the occurrence of any such matter is in issue or is or is deemed to be relevant to the issue; but statements in such works as to private rights or customs are deemed to be irrelevant.[1]

[*Submitted*] Statements of facts in issue or relevant or deemed to be relevant to the issue made in published maps or charts generally offered for public sale as to matters of public notoriety, such as the relative position of towns and countries, and such as are usually represented or stated in such maps or charts, are themselves deemed to be relevant facts;[2] but such statements are irrelevant if they relate to matters of private concern, or matters not likely to be accurately stated in such documents.[3]

Robinson v. *The Duke of Buccleuch and Queensberry*, 1887, 3 Times L. R. 472, the Court of Appeal held in a pedigree case that neither a baptism nor a burial certificate was evidence of the age of the person to whom they related. This had been previously doubted: see *In re Turner; Glenister* v. *Harding*, 1885, 29 Ch. Div. at pp. 990, 991; *Morris* v. *Davies*, 1825, 3 C. & P. 215; and *Cope* v. *Cope*, 1833, 1 Moo. & Rob. 269. See note to Article 31, *ante*, p. 44, note 2.

[1] See cases in 2 Ph. Ev. 155-6, and *Read* v. *Bishop of Lincoln*, [1892], A. C. 644, at pp. 652-654.

[2] In *R.* v. *Orton*, maps of Australia were given in evidence to show the situation of various places at which the defendant said he had lived. In *R.* v. *Jameson*, Trial at Bar, 21 July, 1896, standard maps of South Africa were admitted to show the general positions of the places referred to: Phipson, pp. 378–9.

[3] *E.g.* a line in a tithe commutation map purporting to denote the

ARTICLE 36.

ENTRIES IN BANKERS' BOOKS.

A copy of any entry in a banker's book must in all legal proceedings be received as *primâ facie* evidence of such entry, and of the matters, transactions, and accounts therein recorded [even in favour of a party to a cause producing a copy of an entry in the book of his own bank].[1]

Such copies may be given in evidence only on the condition stated in Article 71 (*f*).

The expression "Bankers' books" includes ledgers, day-books, cash-books, account-books, and all other books used in the ordinary business of the bank.[2]

The word "Bank" is restricted to banks which have duly made a return to the Commissioners of Inland Revenue,

Savings banks certified under the Act relating to savings banks,

Post-office savings banks, and

any company carrying on the business of bankers to which the Companies Acts, 1862 to 1880, are applicable, which has furnished to the registrar of joint-stock companies a list and summary, as required by the second part of the Companies Act, 1862, with the addition of a statement of the names of the several places where it carries on business.[3]

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boundaries of A's property is irrelevant in a question between A and B as to the position of the boundaries: *Wilberforce* v. *Hearfield*, 1877, 5 Ch. Div. 709, and see *Hammond* v. *Bradstreet*, 1854, 10 Ex. 390; and *R.* v. *Berger*, [1894], 1 Q. B. 823. See, too, Phipson, pp. 378–9.

[1] *Harding* v. *Williams*, 1880, 14 Ch. Div. 197.

[2] And applies apparently to the books of bankers in all parts of the United Kingdom: *Kissam* v. *Link*, [1896], 1 Q. B. 574.

[3] 45 & 46 Vict. c. 72, s. 11.

The fact that any bank has duly made a return to the Commissioners of Inland Revenue may be proved in any legal proceeding by the production of a copy of its return verified by the affidavit of a partner or officer of the bank, or by the production of a copy of a newspaper purporting to contain a copy of such return published by the Commissioners of Inland Revenue.

The fact that a company carrying on the business of bankers has duly furnished a list and summary [*semble* with the addition specified] may be proved by the certificate of the registrar or any assistant registrar.[1]

The fact that any such savings bank is certified under the Act relating to savings banks may be proved by an office or examined copy of its certificate. The fact that any such bank is a post-office savings bank may be proved by a certificate purporting to be under the hand of His Majesty's Postmaster-General or one of the secretaries of the Post Office.[2]

ARTICLE 37.

BANKERS NOT COMPELLABLE TO PRODUCE THEIR BOOKS.

A bank or officer of a bank is not in any legal proceeding to which the bank is not a party compellable to produce any banker's book, or to appear as a witness to prove the matters, transactions, and accounts therein recorded unless by order of a Judge of the High Court made for special cause [or by a County Court Judge in respect of actions in his own court].[3]

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[1] 45 & 46 Vict. c. 72, s. 11. [2] 42 & 43 Vict. c. 11. s. 9.
[3] 42 & 43 Vict. c. 11, ss. 7, 10.

ARTICLE 38.

JUDGE'S POWERS AS TO BANKERS' BOOKS.

On the application of any party to a legal proceeding a Court or Judge [including a County Court Judge acting in respect to an action in his own court] may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. Such order may be made either with or without summoning the bank, or any other party, and must be served on the bank three clear days [exclusive of Sundays and Bank holidays] before it is to be obeyed, unless the Court otherwise directs.[1]

ARTICLE 39.*

"JUDGMENT."

The word "judgment" in Articles 40–47 means any final judgment, order, or decree of any Court.

The provisions of Articles 40-45 inclusive are all subject to the provisions of Article 46.

ARTICLE 40.

ALL JUDGMENTS CONCLUSIVE PROOF OF THEIR LEGAL EFFECT.

All judgments whatever are conclusive proof as against all persons of the existence of that state of things which

* See Note XXIII.

[1] 42 & 43 Vict. c. 11, s. 7. See *Davies* v. *White*, 1884, 53 L. J., Q. B. 275; *In re Marshfield, Marshfield* v. *Hutchings*, 1886, 32 Ch. D. 499; *Arnott* v. *Hayes*, 1887, 36 Ch. D. 731. The order may be made in respect of books in any part of the United Kingdom: *Kissam* v. *Link*, [1896], 1 Q. B. 574. See *post*, Article 71 (*b*).

they actually effect when the existence of the state of things so effected is a fact in issue or is or is deemed to be relevant to the issue. The existence of the judgment effecting it may be proved in the manner prescribed in Part II.

Illustrations.

(*a*) The question is, whether A has been damaged by the negligence of his servant B in injuring C's horse.

A judgment in an action, in which C recovered damages against A, is conclusive proof as against B, that C did recover damages against A in that action.[1]

(*b*) The question is, whether A, a shipowner, is entitled to recover as for a loss by capture against B, an underwriter.

A judgment of a competent French prize court condemning the ship and cargo as prize, is conclusive proof that the ship and cargo were lost to A by capture.[2]

(*c*) The question is, whether A can recover damages from B for a malicious prosecution.

The judgment of a Court by which A was acquitted is conclusive proof that A was acquitted by that Court.[3]

(*d*) A, as executor to B, sues C for a debt due from C to B.

The grant of probate to A is conclusive proof as against C, that A is B's executor.[4]

(*e*) A is deprived of his living by the sentence of an ecclesiastical court.

The sentence is conclusive proof of the act of deprivation in all cases.[5]

(*f*) A and B are divorced *a vinculo matrimonii* by a sentence of the Divorce Court.

The sentence is conclusive proof of the divorce in all cases.[6]

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[1] *Green* v. *New River Company*, 1792, 4 T. R. 589. (See Article 44, Illustration (*z*).)

[2] Involved in *Geyer* v. *Aguilar*, 1798, 7 T. R. 681.

[3] *Leggatt* v. *Tollervey*, 1811, 14 East, 302; and see *Caddy* v. *Barlow*, 1827, 1 Man. & Ry. 277.

[4] *Allen* v. *Dundas*, 1789, 3 T. R. 125. In this case the will to which probate had been obtained was forged.

[5] Judgment of Lord Holt in *Philips* v. *Bury*, 1788, 2 T. R. 346, 351.

[6] Assumed in *Needham* v. *Bremner*, 1866, L. R. 1 C. P. 583.

ARTICLE 41.

JUDGMENTS CONCLUSIVE AS BETWEEN PARTIES AND PRIVIES OF FACTS FORMING GROUND OF JUDGMENT.

Every judgment is conclusive proof as against parties and privies of facts directly in issue in the case, actually decided by the Court, and appearing from the judgment itself to be the ground on which it was based; unless evidence was admitted in the action in which the judgment was delivered which is excluded in the action in which that judgment is intended to be proved.[1]

Illustrations.

(*a*) The question is, whether C, a pauper, is settled in parish A or parish B.

D is the mother and E the father of C. D, E, and several of their children were removed from A to B before the question as to C's settlement arose, by an order unappealed against, which order described D as the wife of E.

The statement in the order that D was the wife of E is conclusive as between A and B.[2]

(*b*) A and B each claim administration to the goods of C, deceased.

Administration is granted to B, the judgment declaring that, as far as appears by the evidence, B has proved himself next of kin.

Afterwards there is a suit between A and B for the distribution of the effects of C. The declaration in the first suit is in the second suit conclusive proof as against A that B is nearer of kin to C than A.[3]

(*c*) A company sues A for unpaid premium and calls. A special case being stated in the Court of Common Pleas, A obtains judgment on the ground that he never was a shareholder.

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[1] *R.* v. *Hutchins*, 1880, 5 Q. B. D. 353, supplies a good illustration of this principle.

[2] *R.* v. *Hartington Middle Quarter*, 1855, 4 E. & B. 780; and see *Flitters* v. *Allfrey*, 1874, L. R. 10 C. P. 29; and contrast *Dover* v. *Child*, 1876, 1 Ex. Div. 172.

[3] *Barrs* v. *Jackson*, 1845, 1 Phill. 582, 587, 588.

The company being wound up in the Court of Chancery, A applies for the repayment of the sum he had paid for premium and calls. The decision that he never was a shareholder is conclusive as between him and the company that he never was a shareholder, and he is therefore entitled to recover the sums he paid.[1]

(*d*) A obtains a decree of judicial separation from her husband B, on the ground of cruelty and desertion, proved by her own evidence.

Afterwards B sues A for dissolution of marriage on the ground of adultery, in which suit neither B nor A can give evidence. A charges B with cruelty and desertion. The decree in the first suit is deemed to be irrelevant in the second.[2]

ARTICLE 42.

STATEMENTS IN JUDGMENTS IRRELEVANT AS BETWEEN STRANGERS, EXCEPT IN ADMIRALTY CASES.

Statements contained in judgments as to the facts upon which the judgment is based are deemed to be irrelevant as between strangers, or as between a party, or privy, and a stranger, except[3] in the case of judgments of Courts of Admiralty condemning ship as a prize. In such cases the judgment is conclusive proof as against all persons of the fact on which the condemnation proceeded, where such fact is plainly stated upon the face of the sentence.

Illustrations.

(*a*) The question between A and B is, whether certain lands in Kent had been disgavelled. A special verdict on a feigned issue between C and D (strangers to A and B) finding that in the 2nd Edw. VI. a

[1] *Bank of Hindustan, &c., Alison's Case*, 1873, L. R. 9 Ch. App. 24.

[2] *Stoate* v. *Stoate*, 1861, 2 Swa. & Tri. 223. Both would now be competent witnesses in each suit.

[3] This exception is treated by Lord Eldon as an objectionable anomaly in *Lothian* v. *Henderson*, 1803, 3 Bos. & Pul. at p. 545. See, too, *Castrique* v. *Imrie*, 1870, L. R. 4 E. & I. App. 434-5.

disgavelling Act was passed in words set out in the verdict is deemed to be irrelevant.[1]

(*b*) The question is, whether A committed bigamy by marrying B during the lifetime of her former husband C.

A decree in a suit of jactitation of marriage, forbidding C to claim to be the husband of A, on the ground that he was not her husband, is deemed to be irrelevant.[2]

(*c*) The question is, whether A, a shipowner, has broken a warranty to B, an underwriter, that the cargo of the ship whose freight was insured by A was neutral property.

The sentence of a French prize court condemning ship and cargo, on the ground that the cargo was enemy's property, is conclusive proof in favour of B that the cargo was enemy's property (though on the facts the Court thought it was not).[3]

ARTICLE 43.

EFFECT OF JUDGMENT NOT PLEADED AS AN ESTOPPEL.

If a judgment is not pleaded by way of estoppel it is as between parties and privies deemed to be a relevant fact, whenever any matter, which was, or might have been decided in the action in which it was given, is in issue, or is or is deemed to be relevant to the issue, in any subsequent proceeding.

Such a judgment is conclusive proof of the facts which it decides, or might have decided, if the party who gives evidence of it had no opportunity of pleading it as an estoppel.

Illustrations.

(*a*) A sues B for deepening the channel of a stream, whereby the flow of water to A's mill was diminished.

A verdict recovered by B in a previous action for substantially the

[1] *Doe* v. *Brydges*, 1843, 6 M. & G. 282.

[2] *Duchess of Kingston's Case*, 1776, 2 S. L. C. 713.

[3] *Geyer* v. *Aguilar*, 1798, 7 T. R. 681.

same cause, and which might have been pleaded as an estoppel, is deemed to be relevant, but not conclusive in B's favour.[1]

(*b*) A sues B for breaking and entering A's land, and building thereon a wall and a cornice. B pleads that the land was his, and obtains a verdict in his favour on that plea.

Afterwards B's devisee sues A's wife (who on the trial admitted that she claimed through A) for pulling down the wall and cornice. As the first judgment could not be pleaded as an estoppel (the wife's right not appearing on the pleadings), it is conclusive in B's favour that the land was his.[2]

ARTICLE 44.

JUDGMENTS GENERALLY DEEMED TO BE IRRELEVANT AS BETWEEN STRANGERS.

Judgments are not deemed to be relevant as rendering probable facts which may be inferred from their existence, but which they neither state nor decide—

as between strangers;

as between parties and privies in suits where the issue is different even though they relate to the same occurrence or subject-matter;

or in favour of strangers against parties or privies.

But a judgment is deemed to be relevant as between strangers:

(1) if it is an admission, or

(2) if it relates to a matter of public or general interest, so as to be a statement under Article 30.

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[1] *Vooght* v. *Winch*, 1819, 2 B. & Ald. 662; and see *Feversham* v. *Emerson*, 1855, 11 Ex. 391.

[2] *Whitaker* v. *Jackson*, 1864, 2 H. & C. at p. 926. This had previously been doubted See 2 Ph. Ev. 24, n. 4.

Illustrations.

(*a*) The question is, whether A has sustained loss by the negligence of B his servant, who has injured C's horse.

A judgment recovered by C against A for the injury, though conclusive as against B, as to the fact that C recovered a sum of money from A, is deemed to be irrelevant to the question, whether this was caused by B's negligence.[1]

(*b*) The question whether a bill of exchange is forged arises in an action on the bill. The fact that A was convicted of forging the bill is deemed to be irrelevant.[2]

(*c*) A collision takes place between two ships, A and B, each of which is damaged by the other.

The owner of A sues the owner of B, and recovers damages on the ground that the collision was the fault of B's captain. This judgment is not conclusive in an action by the owner of B against the owner of A, for the damage done to B.[3] [*Semble*, it is deemed to be irrelevant.][4]

(*d*) A is prosecuted and convicted as a principal felon.

B is afterwards prosecuted as an accessory to the felony committed by A.

The judgment against A is deemed to be irrelevant as against B, though A's guilt must be proved as against B.[5]

(*e*) A sues B, a carrier, for goods delivered by A to B.

A judgment recovered by B against a person to whom he had delivered the goods, is deemed to be relevant as an admission by B that he had them.[6]

(*f*) A sues B for trespass on land.

A judgment, convicting A for a nuisance by obstructing a highway on the place said to have been trespassed on is [at least] deemed to be relevant to the question, whether the place was a public highway [and is possibly conclusive].[7]

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[1] *Green* v. *New River Company*, 1792, 4 T. R. 589. (See Article 40, Illustration (*a*).)

[2] Per Blackburn, J., in *Castrique* v. *Imrie*, 1870, L. R. 4 E. & I. App. at p. 434. See *Crippen, In the estate of*, [1911] P. 108, where Evans, P., in dealing with a motion for a grant of administration to the estate of a deceased woman, admitted a certified copy of the conviction of her husband for murdering her as presumptive evidence of the commission of the crime. This decision does not affect the text of Art. 44 as the conviction stated and decided the guilt of the accused.

[3] *The Calypso*, 1856, 1 Swab. Ad. 28.

[4] On the general principle in *Duchess of Kingston's Case*, 1776, 2 Smith's L. C. 754.

[5] *Semble* from *R.* v. *Turner*, 1832, 1 Moo. C. C. 347.

[6] *Tilly* v. *Cowling*, 1701, Buller, N. P. 242, b.; 1 Ld. Raymd. 744.

[7] *Petrie* v. *Nuttall*, 1856, 11 Ex. 569.

ARTICLE 45.

JUDGMENTS CONCLUSIVE IN FAVOUR OF JUDGE.

When any action is brought against any person for anything done by him in a judicial capacity, the judgment delivered, and the proceedings antecedent thereto, are conclusive proof of the facts therein stated, whether they are or are not necessary to give the defendant jurisdiction, if, assuming them to be true, they show that he had jurisdiction.

Illustration.

A sues B (a justice of the peace) for taking from him a vessel and 500 lbs. of gunpowder thereon. B produces a conviction before himself of A for having gunpowder in a boat on the Thames (against 2 Geo. III. c. 28).

The conviction is conclusive proof for B, that the thing called a boat was a boat.[1]

ARTICLE 46.

FRAUD, COLLUSION, OR WANT OF JURISDICTION MAY BE PROVED.

Whenever any judgment is offered as evidence under any of the articles hereinbefore contained, the party against whom it is so offered may prove that the Court which gave it had no jurisdiction, or that it has been reversed, or, if he is a stranger to it, that it was obtained by any fraud or collusion, to which neither he nor any person to whom he is privy was a party.

If an action is brought in an English Court to enforce the

[1] *Brittain* v. *Kinnaird*, 1819, 1 Brod. & Bing. 432.

[2] Cases collected in 2 Taylor, ss. 1715, 1716, 1721. See, too, 2 Ph. Ev. 25, 70, and *Ochsenbein* v. *Papelier*, 1873, 8 Ch. App. 695.

judgment of a foreign Court, and probably if an action is brought in an English Court to enforce the judgment of another English Court, any such matter as aforesaid may be proved by the defendant, even if the matter alleged as fraud was alleged by way of defence in the foreign Court and was not believed by them to exist.[1]

ARTICLE 47.

FOREIGN JUDGMENTS.

The provisions of Articles 40-46 apply to such of the judgments of Courts of foreign countries as can by law be enforced in this country, and so far as they can be so enforced.[2]

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[1] *Abouloff* v. *Oppenheimer*, 1882, 10 Q. B. D. 295.

[2] The cases on this subject are collected in the note on the *Duchess of Kingston's Case*, 2 Smith's L. C. 813-856. A list of the cases will be found in Roscoe's N. P. 208–9. The last leading cases on the subject are *Goddard* v. *Gray*, L. R. 6 Q. B. 139, and *Castrique* v. *Imrie*, 1870, L. R. 4 H. L. 414. See, too, *Schisby* v. *Westenholz*, 1870, L. R. 6 Q. B. 155; *Rousillon* v. *Rousillon*, 1880, 14 Ch. Div. at p. 370; *Novion* v. *Freeman*, 1889, 15 App. Ca. 1; and *Sirdar Gurdyal Singh* v. *Faridkote*, [1894], A. C. 670.

CHAPTER V.*

OPINIONS, WHEN RELEVANT AND WHEN NOT.

ARTICLE 48.

OPINION GENERALLY IRRELEVANT.

THE fact that any person is of opinion that a fact in issue, or relevant or deemed to be relevant to the issue, does or does not exist is deemed to be irrelevant to the existence of such fact, except in the cases specified in this chapter.

Illustration.

The question is, whether A, a deceased testator, was sane or not when he made his will. His friends' opinions as to his sanity, as expressed by his letters which they addressed to him in his lifetime, are deemed to be irrelevant.[1]

ARTICLE 49.

OPINIONS OF EXPERTS ON POINTS OF SCIENCE OR ART.

When there is a question as to any point of science or art, the opinions upon that point of persons specially skilled in any such matter are deemed to be relevant facts.

Such persons are hereinafter called experts.

The words "science or art" include all subjects on which a course of special study or experience is necessary to the

* See Note XXIV.

[1] *Wright* v. *Doe* d. *Tatham*, 1837, 7 A. & E. 313.

formation of an opinion,[1] and amongst others the examination of handwriting.

When there is a question as to a foreign law, the opinions of experts who in their profession are acquainted with such law are the only admissible evidence thereof, though such experts may produce to the Court books which they declare to be works of authority upon the foreign law in question, which books the Court, having received all necessary explanations from the expert, may construe for itself.[2]

It is the duty of the judge to decide, subject to the opinion of the Court above, whether the skill of any person in the matter on which evidence of his opinion is offered is sufficient to entitle him to be considered as an expert.[3]

The opinion of an expert as to the existence of the facts on which his opinion is to be given is irrelevant, unless he perceived them himself.[4]

Illustrations.

(*a*) The question is, whether the death of A was caused by poison. The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died, are deemed to be relevant.[5]

(*b*) The question is, whether A at the time of doing a certain act, was by reason of unsoundness of mind, incapable of knowing the

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[1] Notes to *Carter* v. *Boehm*, 1776, 1 Sm. L. C. 556, and see 28 Vict. c. 18, s. 8.

[2] *Baron de Bode's Case*, 1845, 8 Q. B. 267; *Di Sora* v. *Phillipps*, 1863, 10 H. L. Ca. 624; *Castrique* v. *Imrie*, 1870, L. R. 4 H. L. at p. 434; see, too, *Picton's Case*, 1806, 30 S. T. 510 *et seq.*

[3] *Bristow* v. *Sequeville*, 1850, 6 Ex. 275; *Rowley* v. *L. & N. W. Railway*, 1873, L. R. 8 Ex. 221. *In the Goods of Bonelli*, 1875, L. R. 1 P. D. 69; and see *In the Goods of Dost Aly Khan*, 1880, L. R. 6 P. D. 6.

[4] 1 Ph. 520; Taylor, 1421.

[5] *R.* v. *Palmer*, 1856 (*passim*). See my 'History of Crim. Law,' iii. 389.

nature of the act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are deemed to be relevant.[1]

(*c*) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are deemed to be relevant.[2]

(*d*) The opinions of experts on the questions, whether in illustration (*a*) A's death was in fact attended by certain symptoms; whether in illustration (*b*) the symptoms from which they infer that A was of unsound mind existed; whether in illustration (*c*) either or both of the documents were written by A, are deemed to be irrelevant.

ARTICLE 50.*

FACTS BEARING UPON OPINIONS OF EXPERTS

Facts, not otherwise relevant, have in some cases been permitted to be proved, as supporting or being inconsistent with the opinions of experts.

Illustrations.

(*a*) The question was, whether A was poisoned by a certain poison.

The fact that other persons, who were poisoned by that poison, exhibited certain symptoms alleged to be the symptoms of that poison, were deemed to be relevant.[3]

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* I have altered the wording of this article, so as to make it less absolute than it was in earlier editions. The admission of such evidence is rare and exceptional, and must obviously be kept within narrow limits. At the time of Palmer's trial only two or three cases of poisoning by strychnine had occurred.

[1] *R.* v. *Dove*, 1856 (*passim*). 'History Crim. Law,' iii. 426.

[2] 28 Vict. c. 18, s. 8.

[3] *R.* v. *Palmer*, 1856, printed trial, p. 124, &c., 'Hist. Crim. Law,'

(*b*) The question is, whether an obstruction to a harbour is caused by a certain bank. An expert gives his opinion that it is not.

The fact that other harbours similarly situated in other respects, but where there were no such banks,[1] began to be obstructed at about the same time, is deemed to be relevant.

ARTICLE 51.

OPINION AS TO HANDWRITING, WHEN DEEMED TO BE RELEVANT.

When there is a question as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the supposed writer that it was or was not written or signed by him, is deemed to be a relevant fact.

A person is deemed to be acquainted with the handwriting of another person when he has at any time seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.[2]

Illustration.

The question is, whether a given letter is in the handwriting of A, a merchant in Calcutta.

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iii. 389. In this case evidence was given of the symptoms attending the deaths of Agnes Senet, poisoned by strychnine in 1845, Mrs. Serjeantson Smith, similarly poisoned in 1848, and Mrs. Dove, murdered by the same poison subsequently to the death of Cook, for whose murder Palmer was tried.

[1] *Foulkes* v. *Chadd*, 1782, 3 Doug. 157.

[2] See Illustration.

B is a merchant in London, who has written letters addressed to A, and received in answer letters purporting to be written by him. C is B's clerk, whose duty it was to examine and file B's correspondence. D is B's broker, to whom B habitually submitted the letters purporting to be written by A for the purpose of advising with him thereon.

The opinions of B, C, and D on the question whether the letter is in the handwriting of A are relevant, though neither B, C, nor D ever saw A write.[1]

The opinion of E, who saw A write once twenty years ago, is also relevant.[2]

ARTICLE 52.

COMPARISON OF HANDWRITINGS.

Comparison of a disputed handwriting with any writing proved to the satisfaction of the judge to be genuine is permitted to be made by witnesses, and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute. This paragraph applies to all courts of judicature, criminal or civil, and to all persons having by law, or by consent of parties, authority to hear, receive, and examine evidence.[3]

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[1] *Doe* v. *Sackermore*, 1836, 5 A. & E. 705 (Coleridge, J.); 730 (Patteson, J.); 739-740 (Denman, C.J.).

[2] *R.* v. *Horne Tooke*, 1794, 25 S. T. 71–72.

[3] 28 Vict. c. 18, s. 8, re-enacting 17 & 18 Vict. c. 125, s. 25, now repealed. See *R.* v. *Silverlock*, [1894], 2 Q. B. 766, where it was held that the solicitor for the prosecution was a proper witness to compare handwriting proved to be that of the prisoner with that in which documents produced by the prosecution were written. It seems to be the case that such a witness must be "skilled" or, as Lord Russell said, "peritus;" but he need not "have become peritus in the way of his business or in any definite way;" *vulgo*, he need not be a professional expert.

ARTICLE 53.

OPINION AS TO EXISTENCE OF MARRIAGE, WHEN RELEVANT.

When there is a question whether two persons are or are not married, the facts that they cohabited and were treated by others as man and wife are deemed to be relevant facts, and to raise a presumption that they were lawfully married, and that any act necessary to the validity of any form of marriage which may have passed between them was done; but such facts are not sufficient to prove a marriage in a prosecution for bigamy or in proceedings for a divorce, or in a petition for damages against an adulterer.[1]

ARTICLE 54.

GROUNDS OF OPINION, WHEN DEEMED TO BE RELEVANT.

Whenever the opinion of any living person is deemed to be relevant, the grounds on which such opinion is based are also deemed to be relevant.

Illustration.

An expert may give an account of experiments performed by him for the purpose of forming his opinion.

[1] *Morris* v. *Miller*, 1767, 4 Burr. 2057; *Birt* v. *Barlow*, 1779, 1 Doug. 170; and see *Catherwood* v. *Caslon*, 1844, 13 M. & W. 261. Compare *R.* v. *Mainwaring*, 1856, Dear. & B. 132. See, too, *De Thoren* v. *A. G.*, 1876, 1 App. Cas. 686; *Piers* v. *Piers*, 1849, 2 H. L. Ca. 331. Some of the references in the report of *De Thoren* v. *A. G.* are incorrect.

CHAPTER VI.*

CHARACTER, WHEN DEEMED TO BE RELEVANT AND WHEN NOT.

ARTICLE 55.

CHARACTER GENERALLY IRRELEVANT.

THE fact that a person is of a particular character is deemed to be irrelevant to any inquiry respecting his conduct, except in the cases mentioned in this chapter.

ARTICLE 56.

EVIDENCE OF CHARACTER IN CRIMINAL CASES.

In criminal proceedings, the fact that the person accused has a good character, is deemed to be relevant; but the fact that he has a bad character is deemed to be irrelevant, unless it is itself a fact in issue, or unless evidence has been given that he has a good character, in which case evidence that he has a bad character is admissible.

[1] A person charged with an offence and called as a witness in pursuance of the Criminal Evidence Act, 1898, may not be asked, and if asked may not be required to answer, any

* See Note XXV.

[1] This provision applies to the case of a person who is a competent witness on his own behalf under the Prevention of Cruelty to Children Act, 1904, or, presumably, any of the other Acts enumerated *post*, p. 124, n., as well as under the Criminal Evidence Act, 1898. *Charnock* v. *Merchant*, 1900, 1 Q. B. 474.

question tending to show that he has committed, or been convicted of, or been charged with any offence other than that whereof he is then charged,

or is of bad character,

unless

(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged;[1] or

(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character,

or has given evidence of his own good character;

or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor, or the witnesses for the prosecution; or

(iii) he has given evidence against any other person charged with the same offence.[2]

A mere contradiction of evidence for the prosecution, even though expressed in abusive terms, is not necessarily an imputation within the meaning of (ii).[3]

When any person gives evidence of his good character other than his own sworn testimony, who—

Being on his trial for any felony not punishable with death, has been previously convicted of felony;[4]

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[1] See Article 11 and the concluding paragraphs of this article.

[2] 61 & 62 Vict. c. 36, s. 1 (*f*).

[3] *R.* v. *Rouse & Burrell*, [1903], K. B. (Nov. 27).

[4] 6 & 7 Will. IV. c. 111, referring to 7 & 8 Geo. IV. c. 28, s. 11. If "not punishable with death" means not so punishable at the time when 7 & 8 Geo. IV. c. 28 was passed (21 June, 1827), this narrows the effect of the article considerably.

Or, who being upon his trial for any offence punishable under the Larceny Act, 1861, has been previously convicted of any felony, misdemeanour, or offence punishable upon summary conviction;[1]

Or who, being upon his trial for any offence against the Coinage Offences Act, 1861, or any former Act relating to the coin, has been previously convicted of any offence against any such Act;[2]

The prosecutor may, in answer to such evidence of good character, give evidence of any such previous conviction before the jury return their verdict for the offence for which the offender is being tried.[3]

In this article the word "character" means reputation as distinguished from disposition, and, except as previously mentioned in this article, evidence may be given only of general reputation and not of particular acts by which reputation or disposition is shown.[4]

ARTICLE 57.

CHARACTER AS AFFECTING DAMAGES.

In civil cases, the fact that a person's general reputation is bad, may it seems be given in evidence in reduction of damages; but evidence of rumours that his reputation was

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[1] 24 & 25 Vict. c. 96, s. 116.

[2] 24 & 25 Vict. c. 99, s. 37.

[3] See each of the Acts above referred to.

[4] *R.* v. *Rowton*, 1865, 1 L. & C. 520. *R.* v. *Turberfield*, 1864, 1 L. & C. 495, is a case in which the character of a prisoner became incidentally relevant to a certain limited extent.

bad, and evidence of particular facts showing that his disposition was bad, cannot be given in evidence.[1]

In actions for libel and slander in which the defendant does not by his defence assert the truth of the statement complained of, the defendant is not entitled on the trial to give evidence in chief with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the judge, unless seven days at least before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence.[2]

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[1] *Scott* v. *Sampson*, 1882, 8 Q. B. D. 491, in which all the older cases are minutely examined in the judgment of Cave, J.

[2] R. S. C., Order XXXVI., rule 37.

PART II.

ON PROOF.

CHAPTER VII.

FACTS PROVED OTHERWISE THAN BY EVIDENCE—JUDICIAL NOTICE.

ARTICLE 58.*

OF WHAT FACTS THE COURT TAKES JUDICIAL NOTICE.

IT is the duty of all judges to take judicial notice of the following facts:—

(1) All unwritten laws, rules, and principles having the force of law administered by any Court sitting under the authority of His Majesty and his successors in England or Ireland, whatever may be the nature of the jurisdiction thereof.[1]

(2) All public Acts of Parliament,[1] and all Acts of Parliament whatever, passed since February 4, 1851, unless the contrary is expressly provided in any such Act.[2]

(3) The general course of proceeding and privileges of

* See Note XXVI.

[1] 1 Ph. Ev. 460–1; Taylor, s. 5; and see 36 & 37 Vict. c. 66 (Judicature Act of 1873), s. 25.

[2] 52 & 53 Vict. c. 63 (The Interpretation Act, 1889), s. 9.

Parliament and of each House thereof, and the date and place of their sittings, but not transactions in their journals.[1]

(4) All general customs which have been held to have the force of law in any division of the High Court of Justice or by any of the superior courts of law or equity, and all customs which have been duly certified to and recorded in any such court.[2]

(5) The course of proceeding and all rules of practice in force in the Supreme Court of Justice. Courts of a limited or inferior jurisdiction take judicial notice of their own course of procedure and rules of practice, but not of those of other courts of the same kind, nor does the Supreme Court of Justice take judicial notice of the course of procedure and rules of practice of such Courts.[3]

(6) The accession and [*semble*] the sign manual of His Majesty and his successors.[4]

(7) The existence and title of every State and Sovereign recognised by His Majesty and his successors.[5]

(8) The accession to office, names, titles, functions, and when attached to any decree, order, certificate, or other

[1] 1 Ph. Ev. 460; Taylor, s. 5; but see 8 & 9 Vict. c. 113, s. 3, as to journals of the Houses of Parliament.

[2] The old rule was that each Court took notice of customs held by or certified to it to have the force of law. It is submitted that the effect of the Judicature Act, which fuses all the Courts together, must be to produce the result stated in the text. As to the old law, see *Piper* v. *Chappell*, 1845, 14 M. & W. 649–50. *Ex parte Powell*, *In re Matthews*, 1875, 1 Ch. Div. 505–7, contains some remarks by Lord Justice Mellish as to proving customs till they come by degrees to be judicially noticed.

[3] 1 Ph. Ev. 462–3; Taylor, s. 20.

[4] 1 Ph. Ev. 458; Taylor, ss. 18, 14.

[5] 1 Ph. Ev. 460; Taylor, s. 4.

judicial or official documents, the signatures of all the judges of the Supreme Court of Justice.[1]

(9) The Great Seal, the Privy Seal, the seals of the Superior Courts of Justice,[2] and all seals which any Court is authorised to use by any Act of Parliament,[3] certain other seals mentioned in Acts of Parliament,[3] the seal of the Corporation of London,[4] and the seal of any notary public in the King's dominions.[5]

(10) The extent of the territories under the dominion of His Majesty and his successors; the territorial and political divisions of England and Ireland, but not their geographical position or the situation of particular places; the commencement, continuance, and termination of war between His Majesty and any other Sovereign; and all other public matters directly concerning the general government of His Majesty's dominions.[6]

(11) The ordinary course of nature, natural and artificial divisions of time, the meaning of English words.[7]

(12) All other matters which they are directed by any statute to notice.

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[1] 1 Ph. Ev. 462; Taylor, s. 14; and as to latter part, 8 & 9 Vict. c. 113, s. 2, as modified by 36 & 37 Vict. c. 66, s. 76 (Judicature Act of 1873).

[2] The Judicature Acts confer no seal on the Supreme or High Court or its divisions.

[3] *Doe* v. *Edwards*, 1839, 9 A. & E. 555. See a list in Taylor, s. 6.

[4] 1 Ph. Ev. 464; Taylor, s. 6.

[5] *Cole* v. *Sherard*, 1855, 11 Ex. 482. As to foreign notaries, see *Earl's Trust*, 1858, 4 K. & J. 300.

[6] 1 Ph. Ev. 466, 460, 458; and Taylor, s. 17. As to the existence and limits of foreign states, see *Foster* v. *Globe Venture Syndicate*, 1900, 1 Ch. 811.

[7] 1 Ph. Ev. 465-6; Taylor, s. 16.

ARTICLE 59.

AS TO PROOF OF SUCH FACTS.

No evidence of any fact of which the Court will take judicial notice need be given by the party alleging its existence; but the judge, upon being called upon to take judicial notice thereof, may, if he is unacquainted with such fact, refer to any person or to any document or book of reference for his satisfaction in relation thereto, or may refuse to take judicial notice thereof unless and until the party calling upon him to take such notice produces any such document or book of reference.[1]

ARTICLE 60.

EVIDENCE NEED NOT BE GIVEN OF FACTS ADMITTED.

No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which they have admitted before the hearing and with reference thereto, or by their pleadings.[2] Provided that in a trial for felony the prisoner can make no admissions so as to dispense with proof, though a confession may be proved as against him, subject to the rules stated in Articles 21–24.[3]

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[1] Taylor (from Greenleaf), s. 21. *E.g.* a judge will refer in case of need to an almanac, or to a printed copy of the statutes, or write to the Foreign Office, to know whether a State has been recognised.

[2] R. S. C., O. XXXII. The fact that a document is admitted does not make it relevant and is not equivalent to putting it in evidence, per James, L. J., in *Watson* v. *Rodwell*, 1878, 11 Ch. Div. at p. 150.

[3] 1 Ph. Ev. 391, n. 6. In *R.* v. *Thornhill*, 1838, 8 C. & P., Lord Abinger acted upon this rule in a trial for perjury.

CHAPTER VIII.

OF ORAL EVIDENCE.

ARTICLE 61.

PROOF OF FACTS BY ORAL EVIDENCE.

ALL facts may be proved by oral evidence subject to the provisions as to the proof of documents contained in Chapters IX., X., XI., and XII.

ARTICLE 62.*

ORAL EVIDENCE MUST BE DIRECT.

Oral evidence must in all cases whatever be direct; that is to say—

If it refers to a fact alleged to have been seen, it must be the evidence of a witness who says he saw it;

If it refers to a fact alleged to have been heard, it must be the evidence of a witness who says he heard it;

If it refers to a fact alleged to have been perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

If it refers to an opinion, or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.

* See Note XXVII.

CHAPTER IX.

OF DOCUMENTARY EVIDENCE—PRIMARY AND SECONDARY, AND ATTESTED DOCUMENTS.

ARTICLE 63.

PROOF OF CONTENTS OF DOCUMENTS.

THE contents of documents may be proved either by primary or by secondary evidence.

ARTICLE 64.

PRIMARY EVIDENCE.

Primary evidence means the document itself produced for the inspection of the Court, accompanied by the production of an attesting witness in cases in which an attesting witness must be called under the provisions of Articles 66 and 67; or an admission of its contents proved to have been made by a person whose admissions are relevant under Articles 15–20.[1]

Where a document is executed in several parts, each part is primary evidence of the document:

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties

[1] *Slatterie* v. *Pooley*, 1840, 6 M. & W. 664.

only, each counterpart is primary evidence as against the parties executing it.[1]

Where a number of documents are all made by printing, lithography, or photography, or any other process of such a nature as in itself to secure uniformity in the copies, each is primary evidence of the contents of the rest:[2] but where they are all copies of a common original, no one of them is primary evidence of the contents of the original.[3]

ARTICLE 65.

PROOF OF DOCUMENTS BY PRIMARY EVIDENCE.

The contents of documents must, except in the cases mentioned in Article 71, be proved by primary evidence: and in the cases mentioned in Article 66 by calling an attesting witness.

ARTICLE 66.*

PROOF OF EXECUTION OF DOCUMENT REQUIRED BY LAW TO BE ATTESTED.

If a document is required by law to be attested, it may not be used as evidence (except in the cases mentioned or referred to in the next article) if there be an attesting witness alive, sane, and subject to the process of the Court, until one attesting witness at least has been called for the purpose of proving its execution.

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* See Note XXVIII.

[1] *Roe* d. *West* v. *Davis*, 1806, 7 Ea. 362.

[2] *R.* v. *Watson*, 1817, 2 Star. 129. This case was decided long before the invention of photography; but the judgments delivered by the Court (Ellenborough, C. J., and Abbott, Bayley, and Holroyd, JJ.) establish the principle stated in the text.

[3] *Nodin* v. *Murray*, 1812, 3 Camp. 227.

If it be shown that no such attesting witness is alive or can be found, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

The rule extends to cases in which—

the document has been burnt[1] or cancelled;[2]

the subscribing witness is blind;[3]

the person by whom the document was executed is prepared to testify to his own execution of it;[4]

the person seeking to prove the document is prepared to prove an admission of its execution by the person who executed it, even if he is a party to the cause,[5] unless such admission be made for the purpose of, or has reference to, the cause.

ARTICLE 67.*

CASES IN WHICH ATTESTING WITNESS NEED NOT BE CALLED.

In the following cases, and in the case mentioned in Article 88, but in no others, a person seeking to prove the execution of a document required by law to be attested is not bound to call for that purpose either the party who executed the deed or any attesting witness, or to prove the handwriting of any such party or attesting witness—

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* See Note XXVIII.

[1] *Gillies* v. *Smither*, 1819, 2 Star. R. 528.

[2] *Breton* v. *Cope*, 1791, Pea. R. 43.

[3] *Cronk* v. *Frith*, 1839, 9 C. & P. 197.

[4] *R.* v. *Harringworth*, 1815, 4 M. & S. at p. 353.

[5] *Call* v. *Dunning*, 1803, 4 Ea. 53. See, too, *Whyman* v. *Garth*, 1853, 8 Ex. 803; *Randall* v. *Lynch*, 1810, 2 Camp. 357.

(1) When he is entitled to give secondary evidence of the contents of the document under Article 71 (*a*);[1]

(2) When his opponent produces it when called upon and claims an interest under it in reference to the subject-matter of the suit;[2]

(3) When the person against whom the document is sought to be proved is a public officer bound by law to procure its due execution, who has dealt with it as a document duly executed.[3]

ARTICLE 68.

PROOF WHEN ATTESTING WITNESS DENIES THE EXECUTION.

If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.[4]

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[1] *Cooke* v. *Tamswell*, 1818, 8 Tau. 450; *Poole* v. *Warren*, 1838, 8 A. & E. 582.

[2] *Pearce* v. *Hooper*, 1810, 3 Tau. 90; *Rearden* v. *Minter*, 1843, 5 M. & G. 204. As to the sort of interest necessary to bring a case within this exception, see *Collins* v. *Bayntun*, 1841, 1 Q. B. 118.

[3] *Plumer* v. *Briscoe*, 1847, 11 Q. B. 46. *Bailey* v. *Bidwell*, 1844, 13 M. & W. 73, would perhaps justify a slight enlargement of the exception, but the circumstances of the case were very peculiar. Mr. Taylor (ss. 1852–3) considers it doubtful whether the rule extends to instruments executed by corporations, or to deeds enrolled under the provisions of any Act of Parliament, but his authorities hardly seem to support his view; at all events, as to deeds by corporations.

[4] "Where an attesting witness has denied all knowledge of the matter, the case stands as if there were no attesting witness:" *Talbot* v. *Hodson*, 1816, 7 Tau. 251, 254.

ARTICLE 69.

PROOF OF DOCUMENT NOT REQUIRED BY LAW TO BE ATTESTED.

An attested document not required by law to be attested may in all cases whatever, civil or criminal, be proved as if it was unattested.[1]

ARTICLE 70.

SECONDARY EVIDENCE.

Secondary evidence means—

(1) Examined copies, exemplifications, office copies, and certified copies:[2]

(2) Other copies made from the original and proved to be correct:

(3) Counterparts of documents as against the parties who did not execute them:[3]

(4) Oral accounts of the contents of a document given by some person who has himself seen it.

ARTICLE 71.

CASES IN WHICH SECONDARY EVIDENCE RELATING TO DOCUMENTS MAY BE GIVEN.

Secondary evidence may be given of the contents of a document in the following cases—

(*a*) When the original is shown or appears to be in the possession or power of the adverse party,

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[1] 28 & 29 Vict. c. 18, ss. 1, 7; re-enacting 17 & 18 Vict. c. 125, s. 26, now repealed.

[2] See Chapter X.

[3] *Munn* v. *Godbold*, 1825, 3 Bing. 292.

and when, after the notice mentioned in Article 72, he does not produce it;[1]

(*b*) When the original is shown or appears to be in the possession or power of a stranger not legally bound to produce it, and who refuses to produce it after being served with a *subpœna duces tecum*, or after having been sworn as a witness and asked for the document and having admitted that it is in court;[2]

(*c*) When the original has been destroyed or lost, and proper search has been made for it;[3]

(*d*) When the original is of such a nature as not to be easily movable,[4] or is in a country from which it is not permitted to be removed;[5]

(*e*) When the original is a public document;[6]

(*f*) When the document is an entry in a banker's book, proof of which is admissible under Article 36.

(*g*) When the original is a document for the proof of which special provision is made by any Act of Parliament, or any law in force for the time being;[6] or

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[1] *R.* v. *Watson*, 1788, 2 T. R. at p. 201. *Entick* v. *Carrington*, 1765, 19 S. T. at p. 1073, is cited by Mr. Phillips as an authority for this proposition. I do not think it supports it, but it shows the necessity for the rule, as at common law no power existed to compel the production of documents.

[2] *Miles* v. *Oddy*, 1834, 6 C. & P. at p. 732; *Marston* v. *Downes*, 1834, 1 A. & E. 31.

[3] 1 Ph. Ev. s. 452; 2 Ph. Ev. 281; Taylor (from Greenleaf), s. 429. The loss may be proved by an admission of the party or his attorney: *R.* v. *Haworth*, 1830, 4 C. & P. 254.

[4] *Mortimer* v. *McCallan*, 1840, 6 M. & W. at pp. 67, 68 (referring to the case of a libel written on a wall); *Bruce* v. *Nicolopulo*, 1855, 11 Ex. 135 (the case of a placard posted on a wall).

[5] *Alivon* v. *Furnival*, 1834, 1 C. M. & R. 277, 291–2.

[6] See Chapter X.

(*h*) When the originals consist of numerous documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection: provided that that result is capable of being ascertained by calculation.[1]

Subject to the provisions hereinafter contained, any secondary evidence of a document is admissible.[2]

In case (*f*) the copies cannot be received as evidence unless it be first proved that the book in which the entries copied were made was at the time of making one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody and control of the bank, which proof may be given orally or by affidavit by a partner or officer of the bank, and that the copy has been examined with the original entry and is correct, which proof must be given by some person who has examined the copy with the original entry and may be given orally or by affidavit.[3]

In case (*h*) evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

Questions as to the existence of facts rendering secondary evidence of the contents of documents admissible are to be

[1] *Roberts* v. *Doxen*, 1791; 1 Peake, 116; *Meyer* v. *Sefton*, 1817, 2 Star. at p. 276. The books, &c., should in such a case be ready to be produced if required. *Johnson* v. *Kershaw*, 1847, 1 De G. & S. at p. 264.

[2] If a counterpart is known to exist, it is the safest course to produce or account for it: *Munn* v. *Godbold*, 1825, 3 Bing. 297; *R.* v. *Castleton*, 1795, 6 T. R. 236.

[3] 42 & 43 Vict. c. 11, ss. 3, 5.

decided by the judge, unless in deciding such a question the judge would in effect decide the matter in issue.

ARTICLE 72.*

RULES AS TO NOTICE TO PRODUCE.

Secondary evidence of the contents of the documents referred to in Article 71 (*a*) may not be given unless the party proposing to give such secondary evidence has,

if the original is in the possession or under the control of the adverse party, given him such notice to produce it as the Court regards as reasonably sufficient to enable it to be procured;[1] or has,

if the original is in the possession of a stranger to the action, served him with a *subpœna duces tecum* requiring its production;[2]

if a stranger so served does not produce the document, and has no lawful justification for refusing or omitting to do so, his omission does not entitle the party who served him with the *subpœna* to give secondary evidence of the contents of the document.[3]

Such notice is not required in order to render secondary evidence admissible in any of the following cases:—

(1) When the document to be proved is itself a notice;

(2) When the action is founded upon the assumption that the document is in the possession or power of the adverse party and requires its production;[4]

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* See Note XXIX.

[1] *Dwyer* v. *Collins*, 1852, 7 Ex. at p. 648.

[2] *Newton* v. *Chaplin*, 1850, 10 C. B. 356.

[3] *R.* v. *Llanfaethly*, 1853, 2 E. & B. 940.

[4] *How* v. *Hall*, 1811, 14 Ea. 274. In an action on a bond, no

(3) When it appears or is proved that the adverse party has obtained possession of the original from a person subpœnaed to produce it;[1]

(4) When the adverse party or his agent has the original in court.[2]

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notice to produce the bond is required. See other illustrations in 2 Ph. Ev. 273; Taylor, s. 452.

[1] *Leeds* v. *Cook*, 1803, 4 Esp. 256.

[2] Formerly doubted, see 2 Ph. Ev. 278, but so held in *Dwyer* v. *Collins*, 1852, 7 Ex. 639.

CHAPTER X.

PROOF OF PUBLIC DOCUMENTS.

ARTICLE 73.

PROOF OF PUBLIC DOCUMENTS.

WHEN a statement made in any public document, register, or record, judicial or otherwise, or in any pleading or deposition kept therewith is in issue, or is relevant to the issue in any proceeding, the fact that that statement is contained in that document may be proved in any of the ways mentioned in this chapter.[1]

ARTICLE 74.

PRODUCTION OF DOCUMENT ITSELF.

The contents of any public document whatever may be proved by producing the document itself for inspection from proper custody, and identifying it as being what it professes to be.

ARTICLE 75.*

EXAMINED COPIES.

The contents of any public document whatever may in all cases be proved by an examined copy.

An examined copy is a copy proved by oral evidence to

* See Note XXX., also *Doe* v. *Ross*, 1840, 7 M. & W. at p. 106.
[1] See Articles 36 & 90.

have been examined with the original and to correspond therewith. The examination may be made either by one person reading both the original and the copy, or by two persons, one reading the original and the other the copy, and it is not necessary (except in peerage cases [1]) that each should alternately read both.[2]

ARTICLE 76.

GENERAL RECORDS OF THE REALM.

Any record under the charge and superintendence of the Master of the Rolls for the time being, may be proved by a copy certified as a true and authentic copy by the deputy keeper of the records or one of the assistant record keepers, and purporting to be sealed or stamped with the seal of the Record Office.[3]

ARTICLE 77.*

EXEMPLIFICATIONS.

An exemplification is a copy of a record set out either under the Great Seal or under the Seal of a Court.

A copy made by an officer of the Court, bound by law to make it, is equivalent to an exemplification, though it is sometimes called an office copy.

An exemplification is equivalent to the original document exemplified.

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* See Note XXXI.

[1] *Slane Peerage Case*, 1835, 5 C. & F. at p. 42.

[2] 2 Ph. Ev. 200, 231 ; Taylor, s. 1545 ; R. N. P. 98.

[3] 1 & 2 Vict. c. 94, ss. 1, 12, 13.

ARTICLE 78.*

COPIES EQUIVALENT TO EXEMPLIFICATIONS.

A copy made by an officer of the Court, who is authorised to make it by a rule of Court, but not required by law to make it, is regarded as equivalent to an exemplification in the same Cause and Court, but in other Causes or Courts it is not admissible unless it can be proved as an examined copy.

ARTICLE 79.

CERTIFIED COPIES.

It is provided by many statutes that various certificates, official and public documents, documents and proceedings of corporations, and of joint stock and other companies, and certified copies of documents, bye-laws, entries in registers and other books, shall be receivable in evidence of certain particulars in Courts of Justice, provided they are respectively authenticated in the manner prescribed by such statutes.[1]

Whenever, by virtue of any such provision, any such certificate or certified copy as aforesaid is receivable in proof of any particular in any Court of Justice, it is admissible as evidence if it purports to be authenticated in the manner prescribed by law without proof of any stamp, seal, or signature required for its authentication or of the official character of the person who appears to have signed it.[2]

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* See Note XXXI.

[1] 8 & 9 Vict. c. 113, preamble. Many such statutes are specified in Taylor, ss. 1601 n. ; 1611 n. See, too, R. N. P. 98, 99, and the Appendix to this work.

[2] *Ibid.* s. 1. I believe the above to be the effect of the provision,

Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom is admissible in proof of its contents,[1] provided it purports to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted. Every such officer must furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words.[2]

ARTICLE 80.

DOCUMENTS ADMISSIBLE THROUGHOUT THE KING'S DOMINIONS.

If by any law in force for the time being any document is admissible in evidence of any particular either in Courts of Justice in England and Wales, or in Courts of Justice in Ireland, without proof of the seal, or stamp, or signature authenticating the same, or of the judicial or official

but the language is greatly condensed. Some words at the end of the section are regarded as unmeaning by several text writers. See, *e.g.*, Roscoe's N. P., p. 100; 2 Ph. Ev. 241; Taylor, 7th ed. s. 7, note 1. Mr. Taylor says that the concluding words of the section were introduced into the Act while passing through the House of Commons. He adds, they appear to have been copied from 1 & 2 Vict. c. 94, s. 13 (see art. 76), "by some honourable member who did not know distinctly what he was about." They certainly add nothing to the sense.

[1] The words, "provided it be proved to be an examined copy or extract or," occur in the Act, but are here omitted because their effect is given in Article 75.

[2] 14 & 15 Vict. c. 99, s. 14.

character of the person appearing to have signed the same, that document is also admissible in evidence to the same extent and for the same purpose, without such proof as aforesaid, in any Court or before any judge in any part of the King's dominions except Scotland.[1]

ARTICLE 81.

KING'S PRINTERS' COPIES.

The contents of Acts of Parliament, not being public Acts, may be proved by copies thereof purporting to be printed by the King's printers;

The journals of either House of Parliament; and

Royal proclamations,

may be proved by copies thereof purporting to be printed by the printers to the Crown or by the printers to either House of Parliament.[2]

ARTICLE 82.

PROOF OF IRISH STATUTES.

The copy of the statutes of the kingdom of Ireland enacted by the Parliament of the same prior to the union of the kingdoms of Great Britain and Ireland, and printed and published by the printer duly authorised by King George III. or any of his predecessors, is conclusive evidence of the contents of such statutes.[3]

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[1] Consolidates 14 & 15 Vict. c. 99, s. 9, 10, 11, 19. Sect. 9 provides that documents admissible in England shall be admissible in Ireland; sect. 10 is the converse of 9; sect. 11 enacts that documents admissible in either shall be admissible in the "British Colonies;" and sect. 19 defines the British Colonies as including India, the Channel Islands, the Isle of Man, and "all other possessions" of the British Crown, wheresoever and whatsover. This cannot mean to include Scotland, though the literal sense of the words would perhaps extend to it.

[2] 8 & 9 Vict. c. 113, s. 3. Is there any difference between the King's printers and the printers to the Crown.

[3] 41 Geo. III. c. 90, s. 9.

ARTICLE 83.

PROCLAMATIONS, ORDERS IN COUNCIL, ETC.

The contents of any proclamation, order, or regulation issued at any time by His Majesty or by the Privy Council, and of any proclamation, order, or regulation issued at any time by or under the authority of any such department of the Government or officer as is mentioned in the first column of the note[1] hereto, may be proved in all or any of the modes hereinafter mentioned; that is to say—

[1]

COLUMN 1. Name of Department or Officer.	COLUMN 2. Names of Certifying Officers.
The Commissioners of the Treasury.	Any Commissioner, Secretary, or Assistant Secretary of the Treasury.
The Commissioners for executing the Office of Lord High Admiral.	Any of the Commissioners for executing the Office of Lord High Admiral or either of the Secretaries to the said Commissioners.
Secretaries of State.	Any Secretary or Under-Secretary of State.
Committee of Privy Council for Trade.	Any Member of the Committee of Privy Council for trade or any Secretary or Assistant Secretary of the said Committee.
The Ministry of Health (which takes the place of the Poor Law Board, and the Local Government Board).	The Minister; or any Secretary or Assistant Secretary of the Ministry (34 & 35 Vict. c. 70, s. 5 and 9 & 10 Geo. 5, c. 21, ss.3 & 12 (2), and 6 & 7 Geo. 5, c. 68, s. 11.

[Schedule to 31 & 32 Vict. c. 37.]

The following enactments apply the provisions of the Documentary Evidence Act to their subject-matter, so that the names of the following departments or officers must be taken to be in the first column of the	Schedule, and the names of the appropriate certifying officers in the second. 33 & 34 Vict. c. 75, s. 83, and 62 & 63 Vict. c. 33, s. 2; the Board of Education; any member, or Secretary or Assistant Secretary of the Board.—

(1) By the production of a copy of the Gazette purporting to contain such proclamation, order of regulation:

(2) By the production of a copy of such proclamation, order, or regulation purporting to be printed by the Government printer, or, where the question arises in a Court in any British colony or possession, of a copy purporting to be printed under the authority of the legislature of such British colony or possession:

(3) By the production, in the case of any proclamation, order, or regulation issued by His Majesty or by the Privy Council, of a copy or extract purporting to be certified to be true by the Clerk of the Privy Council or by any one of the Lords or others of the Privy Council, and, in the case of any proclamation, order, or regulation issued by or under

58 & 59 Vict. c. 9, s. 1, and 3 Ed. 7, c. 31, s. 1; the Board of Agriculture and Fisheries; the President or any member of the Board, or any person authorised by the President to act on his behalf.—8 Ed. 7, c. 48, s. 36; the Post Master General; any Secretary or Assistant Secretary of the Post Office.—3 & 4 Geo. 5. c. 37, s. 29; Insurance Commissioners and Joint Committees under the National Insurance Acts, 1911–1913; the Chairman or other member, or the Secretary or Clerk or other person authorised to act on their behalf, of the Commissioners or Committee.—5 & 6 Geo. 5, c. 94, s. 5; the Army Council; two members or the Secretary of the Army Council, or any person authorised by the Army Council to act on their behalf (see the Act as to Scotland and Ireland).—6 & 7 Geo. 5, c. 65, s. 6; the Minister of Pensions; the Minister, or a Secretary of the Ministry, or any person authorised by the Minister to act on his behalf.—6 & 7 Geo. 5, c. 68, s. 11 (4); the Minister of Labour; the Minister or a Secretary of the Ministry, or any person authorised by the Minister to act on his behalf.—Id.; the Air Council; the President or Secretary of the Council or any person authorised by the President to act on behalf of the Council.—9 & 10 Geo. 5, c. 58, s. 2 (5); The Forestry Commissioners; the Chairman, or any other Commissioner, or the Secretary, or any person authorised to act on behalf of the secretary. Most of these Acts contain separate provisions effecting much the same end in slightly different terms, a curious duplication of legislation. For other cases in which the legislature gives a prescribed effect to particular documents, see the Appendix.

the authority of any of the said departments or officers, by the production of a copy or extract purporting to be certified to be true by the person or persons specified in the second column of the said note in connection with such department or officer.

Any copy or extract made under this provision may be in print or in writing, or partly in print and partly in writing.

No proof is required of the handwriting or official position of any person certifying, in pursuance of this provision, to the truth of any copy of or extract from any proclamation, order, or regulation.[1]

Subject to any law that may be from time to time made by the legislature of any British Colony or possession, this provision is in force in every such colony and possession.[2]

Where any enactment, whether passed before or after June, 1882, provides that a copy of any Act of Parliament, proclamation, order, regulation, rule, warrant, circular, list, gazette, or document shall be conclusive evidence, or be evidence, or have any other effect when purporting to be printed by the Government printer, or the King's printer, or a printer authorised by His Majesty, or otherwise under His Majesty's authority, whatever may be the precise expression used, such copy shall also be conclusive evidence, or evidence, or have the said effect, as the case may be, if it purports to be printed under the superintendence or authority of His Majesty's Stationery Office.[3]

ARTICLE 84.

FOREIGN AND COLONIAL ACTS OF STATE, JUDGMENTS, ETC.

All proclamations, treaties, and other acts of state of any foreign state, or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any Court of Justice in any foreign state or in any British colony, and all affidavits, pleadings, and other legal documents filed or

[1] 31 & 32 Vict. c. 37, s. 2.
[2] 31 & 32 Vict. c. 37, s. 3.
[3] 45 Vict. c. 9, s. 2, Documentary Evidence Act, 1882. Sect. 4 extends the Act of 1868 to Ireland.

deposited in any such Court, may be proved either by examined copies or by copies authenticated as hereinafter mentioned; that is to say—

If the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign state or British possession to which the original document belongs;

And if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign Court, in any British possession, or an affidavit, pleading, or other legal document filed or deposited in any such Court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of the foreign or other Court to which the original document belongs, or, in the event of such Court having no seal, to be signed by the judge, or, if there be more than one judge, by any one of the judges of the said Court, and such judge must attach to his signature a statement in writing on the said copy that the court whereof he is judge has no seal;

If any of the aforesaid authenticated copies purports to be sealed or signed as hereinbefore mentioned, it is admissible in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement.[1]

[1] 14 & 15 Vict. c. 99, s. 7.

Colonial laws assented to by the governors of colonies, and bills reserved by the governors of such colonies for the signification of His Majesty's pleasure, and the fact (as the case may be) that such law has been duly and properly passed and assented to, or that such bill has been duly and properly passed and presented to the governor, may be proved (*primâ facie*) by a copy certified by the clerk or other proper officer of the legislative body of the colony to be a true copy of any such law or bill. Any proclamation purporting to be published by authority of the governor in any newspaper in the colony to which such law or bill relates, and signifying His Majesty's disallowance of any such colonial law, or His Majesty's assent to any such reserved bill, is *primâ facie* proof of such disallowance or assent.[1]

ARTICLE 84A.

ANSWERS OF SECRETARY OF STATE AS TO FOREIGN JURISDICTION.

The answers of a Secretary of State to questions in a document under the seal of a Court in His Majesty's dominions or held under the authority of His Majesty, framed so as to raise any question which has arisen in any proceedings, civil or criminal, in such Court, as to the existence, or extent, of any jurisdiction of His Majesty in a foreign country, are conclusive evidence of the matters therein contained; and the decisions of the Secretary of State, are for the purpose of the proceedings, final.[2]

[1] 28 & 29 Vict. c. 63, s. 6. "Colony" in this paragraph means "all His Majesty's possessions abroad" having a legislature, "except the Channel Islands, the Isle of Man, and India." "Colony" in the rest of the article includes those places.

[2] 53 & 54 Vict. c. 37, s. 4.

CHAPTER XI.

PRESUMPTIONS AS TO DOCUMENTS.

ARTICLE 85.

PRESUMPTION AS TO DATE OF A DOCUMENT.

WHEN any document bearing a date has been proved, it is presumed to have been made on the day on which it bears date, and if more documents than one bear date on the same day, they are presumed to have been executed in the order necessary to effect the object for which they were executed, but independent proof of the correctness of the date will be required if the circumstances are such that collusion as to the date might be practised, and would, if practised, injure any person, or defeat the objects of any law.[1]

Illustrations.

(*a*) An instrument admitting a debt, and dated before the act of bankruptcy, is produced by a bankrupt's assignees, to prove the petitioning creditor's debt. Further evidence of the date of the transaction is required in order to guard against collusion between the assignees and the bankrupt, to the prejudice of creditors whose claims date from the interval between the act of bankruptcy and the adjudication.[2]

(*b*) In a petition for damages on the ground of adultery letters are produced between the husband and wife, dated before the alleged

[1] 1 Ph. Ev. 482–3; Taylor, s. 169; Best, s. 402.

[2] *Anderson* v. *Weston*, 1840, 6 Bing. N. C. at p. 301; *Sinclair* v. *Baggallay*, 1838, 4 M. & W. 312.

adultery, and showing that they were then on affectionate terms. Further evidence of the date is required to prevent collusion, to the prejudice of the person petitioned against.[1]

ARTICLE 86.

PRESUMPTION AS TO STAMP OF A DOCUMENT.

When any document is not produced after due notice to produce, and after being called for, it is presumed to have been duly stamped,[2] unless it be shown to have remained unstamped for some time after its execution.[3]

ARTICLE 87.

PRESUMPTION AS TO SEALING AND DELIVERY OF DEEDS.

When any document purporting to be and stamped as a deed, appears or is proved to be or to have been signed and duly attested, it is presumed to have been sealed and delivered, although no impression of a seal appears thereon.[4]

ARTICLE 88.

PRESUMPTION AS TO DOCUMENTS THIRTY YEARS OLD.

Where any document purporting or proved to be thirty years old is produced from any custody which the judge in the particular case considers proper, it is presumed that the signature and every other part of such document which

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[1] *Houlston* v. *Smith*, 1825, 2 C. & P. at p. 24.

[2] *Closmadeuc* v. *Carrel*, 1856, 18 C. B. 36. In this case the growth of the rule is traced, and other cases are referred to, in the judgment of Cresswell, J.

[3] *Marine Investment Company* v. *Haviside*, 1872, L. R. 5 H. L. 624.

[4] *Hall* v. *Bainbridge*, 1848, 12 Q. B. 699, at p. 710. *Re Sandilands*, 1871, L. R. 6 C. P. 411.

purports to be in the handwriting of any particular person is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested, by the persons by whom it purports to be executed and attested; and the attestation or execution need not be proved, even if the attesting witness is alive and in court.

Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.[1]

ARTICLE 89.

PRESUMPTION AS TO ALTERATIONS.

No person producing any document which upon its face appears to have been altered in a material part can claim under it the enforcement of any right created by it, unless the alteration was made before the completion of the document or with the consent of the party to be charged under it or his representative in interest.

This rule extends to cases in which the alteration was made by a stranger, whilst the document was in the custody of the person producing it, but without his knowledge or leave.[2]

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[1] 2 Ph. Ev. 245–8; Starkie, 521–6; Taylor, s. 87 and ss. 658–667; Best, s. 220.

[2] *Figot's Case*, 1604, 11 Coke's Rep. 47; *Davidson* v. *Cooper*, 1843, 11 M. & W. 778; 1844, 13 M. & W. 343; *Aldous* v. *Cornwell*, 1868,

Alterations and interlineations appearing on the face of a deed are, in the absence of all evidence relating to them, presumed to have been made before the deed was completed.[1]

Alterations and interlineations appearing on the face of a will are, in the absence of all evidence relating to them, presumed to have been made after the execution of the will.[2]

There is no presumption as to the time when alterations and interlineations, appearing on the face of writings not under seal, were made [3] except that it is presumed that they were so made that the making would not constitute an offence.[4]

An alteration is said to be material when, if it had been made with the consent of the party charged, it would have affected his interest or varied his obligations in any way whatever.

An alteration which in no way affects the rights of the parties or the legal effect of the instrument, is immaterial.[5]

L. R. 3 Q. B. 573. This qualifies one of the resolutions in *Pigot's Case*. The judgment reviews a great number of authorities on the subject.

[1] *Doe* v. *Catomore*, 1851, 16 Q. B. 745.

[2] *Simmons* v. *Rudall*, 1880, 1 Sim. (N. S.) 136.

[3] *Knight* v. *Clements*, 1838, 8 A. & E. 215.

[4] *R.* v. *Gordon*, 1855, Dearsley & P. 592.

[5] This appears to be the result of many cases referred to in Taylor, ss. 1822, 1823; see also the judgments in *Davidson* v. *Cooper* and *Aldous* v. *Cornwell*, referred to above.

CHAPTER XII.

OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE, AND OF THE MODIFICATION AND INTERPRETATION OF DOCUMENTARY BY ORAL EVIDENCE.

ARTICLE 90.*

EVIDENCE OF TERMS OF CONTRACTS, GRANTS, AND OTHER DISPOSITIONS OF PROPERTY REDUCED TO A DOCUMENTARY FORM.

WHEN any judgment of any Court or any other judicial or official proceeding, or any contract or grant, or any other disposition of property, has been reduced to the form of a document or series of documents, no evidence may be given of such judgment or proceeding, or of the terms of such contract, grant, or other disposition of property, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.[1] Nor may the contents of any such document be contradicted, altered, added to, or varied by oral evidence.

Provided that any of the following matters may be proved—

(1) Fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated,[2] want or failure of consideration, or mistake

* See Note XXXII.

[1] Illustrations (*a*) and (*b*).

[2] *Reffell* v. *Reffell*, 1866, L. R. 1 P. & D. 139. Mr. Starkie extends this to mistakes in some other formal particulars. 3 Star. Ev. 787–8.

in fact or law, or any other matter which, if proved, would produce any effect upon the validity of any document, or of any part of it, or which would entitle any person to any judgment, decree, or order relating thereto.[1]

(2) The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the Court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them.[2]

(3) The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant, or disposition of property.[3]

(4) The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant, or disposition of property, provided that such agreement is not invalid under the Statute of Frauds, or otherwise.[4]

(5) Any usage or custom by which incidents not expressly mentioned in any contract are annexed to contracts of that description; unless the annexing of such incident to such contract would be repugnant to or inconsistent with the express terms of the contract.[5]

Oral evidence of a transaction is not excluded by the fact

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[1] Illustration (*c*).
[2] Illustrations (*d*) and (*e*).
[3] Illustrations (*f*) and (*g*).
[4] Illustration (*h*).
[5] *Wigglesworth* v. *Dallison*, 1779, and note thereto, 1 S. L. C. 613–648. A later case is *Johnson* v. *Raylton*, 1881, 7 Q. B. D. 438, in which it was held that evidence was admissible of a custom that in a contract with a manufacturer for iron plates he warranted them to be of his own make.

that a documentary memorandum of it was made, if such memorandum was not intended to have legal effect as a contract, or other disposition of property.[1]

Oral evidence of the existence of a legal relation is not excluded by the fact that it has been created by a document, when the fact to be proved is the existence of the relationship itself, and not the terms on which it was established or is carried on.[2]

The fact that a person holds a public office need not be proved by the production of his written or sealed appointment thereto, if he is shown to have acted on it.[3]

Illustrations.

(*a*) A policy of insurance is effected on goods "in ships from Surinam to London." The goods are shipped in a particular ship, which is lost. The fact that that particular ship was orally excepted from the policy cannot be proved.[4]

(*b*) An estate called Gotton Farm is conveyed by a deed which describes it as consisting of the particulars described in the first division of a schedule and delineated in a plan on the margin of the schedule. Evidence cannot be given to show that a close not mentioned in the schedule or delineated in the plan was always treated as part of Gotton Farm, and was intended to be conveyed by the deed.[5]

(*c*) A institutes a suit against B for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions, as that provision was inserted in it by mistake. A may prove that such a mistake was made as would entitle him to have the contract reformed.[6]

(*d*) A lets land to B, and they agree that a lease shall be given by A to B.

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[1] Illustration (*i*). [2] Illustration (*j*).

[3] See authorities collected in 1 Ph. Ev. 449-50; Taylor, s. 171.

[4] *Weston* v. *Emes*, 1808, 1 Tau. 115.

[5] *Barton* v. *Dawes*, 1850, 10 C. B. 261-265.

[6] Story's 'Equity Jurisprudence,' chap. v. ss. 153-162

Before the lease is given, B tells A that he will not sign it unless A promises to destroy the rabbits. A does promise. The lease is afterwards granted, and reserves sporting rights to A, but does not mention the destruction of the rabbits. B may prove A's oral agreement as to the rabbits.[1]

(*e*) A and B agree orally that B shall take up an acceptance of A's, and that thereupon A and B shall make a written agreement for the sale of certain furniture by A to B. B does not take up the acceptance. A may prove the oral agreement that he should do so.[2]

(*f*) A and B enter into a written agreement for the sale of an interest in a patent, and at the same time agree orally that the agreement shall not come into force unless C approves of it. C does not approve. The party interested may show this.[3]

(*g*) A, a farmer, agrees in writing to transfer to B, another farmer, a farm which A holds of C. It is orally agreed that the agreement is to be conditional on C's consent. B sues A for not transferring the farm. A may prove the condition as to C's consent, and the fact that he does not consent.[4]

(*h*) A agrees in writing to sell B 14 lots of freehold land and make a good title to each of them. Afterwards B consents to take one lot, though the title is bad. Apart from the Statute of Frauds, this agreement might be proved.[5]

(*i*) A sells B a horse, and orally warrants him quiet in harness. A also gives B a paper in these words: "Bought of A a horse for £17 2*s.* 6*d.*" B may prove the oral warranty.[6]

(*j*) The question is, whether A gained a settlement by occupying and paying rent for a tenement. The facts of occupation and payment of rent may be proved by oral evidence, although the contract is in writing.[7]

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[1] *Morgan* v. *Griffiths*, 1871, L. R. 6 Ex. 70; and see *Angell* v. *Duke*, 1875, L. R. 10 Q. B. 174.

[2] *Lindley* v. *Lacey*, 1864, 17 C. B. (N. S.) 578.

[3] *Pym* v. *Campbell*, 1856, 6 E. & B. 370.

[4] *Wallis* v. *Littell*, 1861, 11 C. B. (N. S.) 369.

[5] *Goss* v. *Lord Nugent*, 1833, 5 B. & Ad. 58, 65.

[6] *Ailen* v. *Prink*, 1838, 4 M. & W. 140.

[7] *R.* v. *Hull*, 1827, 7 B. & C. 611.

ARTICLE 91.*

WHAT EVIDENCE MAY BE GIVEN FOR THE INTERPRETATION OF DOCUMENTS.

(1) Putting a construction upon a document means ascertaining the meaning of the signs or words made upon it, and their relation to facts.

(2) In order to ascertain the meaning of the signs and words made upon a document, oral evidence may be given of the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local, and provincial expressions, of abbreviations, and of common words which, from the context, appear to have been used in a peculiar sense;[1] but evidence may not be given to show that common words, the meaning of which is plain, and which do not appear from the context to have been used in a peculiar sense, were in fact so used.[2]

(3) If the words of a document are so defective or ambiguous as to be unmeaning, no evidence can be given to show what the author of the document intended to say.[3]

(4) In order to ascertain the relation of the words of a document to facts, every fact may be proved to which it refers, or may probably have been intended to refer,[4] or which identifies any person or thing mentioned in it.[5] Such facts are hereinafter called the circumstances of the case.[6]

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* See Note XXXIII.

[1] Illustrations (*a*) (*b*) (*c*).

[2] Illustration (*d*).

[3] Illustrations (*e*) and (*f*).

[4] See all the Illustrations.

[5] Illustration (*g*).

[6] As to proving facts showing the knowledge of the writer, and for

(5) If the words of a document have a proper legal meaning, and also a less proper meaning, they must be deemed to have their proper legal meaning, unless such a construction would be unmeaning in reference to the circumstances of the case, in which case they may be interpreted according to their less proper meaning.[1]

(6) If the document has one distinct meaning in reference to the circumstances of the case, it must be construed accordingly, and evidence to show that the author intended to express some other meaning is not admissible.[2]

(7) If the document applies in part but not with accuracy or not completely to the circumstances of the case, the Court may draw inferences from those circumstances as to the meaning of the document, whether there is more than one, or only one thing or person to whom or to which the inaccurate description may equally well apply. In such cases no evidence can be given of statements made by the author of the document as to his intentions in reference to the matter to which the document relates, though evidence may be given as to his circumstances, and as to his habitual use of language or names for particular persons or things.[3]

(8) If the language of the document, though plain in itself, applies equally well to more objects than one, evidence may be given both of the circumstances of the case and of statements made by any party to the document as to his intentions in reference to the matter to which the document relates.[4]

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an instance of a document which is not admissible for that purpose, see *Adie* v. *Clark*, 1876, 3 Ch. Div. 134, 142.

[1] Illustration (*k*).
[2] Illustrations (*k*) (*l*) (*m*).
[3] Illustration (*i*).
[4] Illustrations (*n*) (*o*).

(9) If the document is of such a nature that the Court will presume that it was executed with any other than its apparent intention, evidence may be given to show that it was in fact executed with its apparent intention.[1]

Illustrations.

(*a*) A lease contains a covenant as to "ten thousand rabbits." Oral evidence to show that a thousand meant, in relation to rabbits, 1200, is admissible.[2]

(*b*) A sells to B "1170 bales of gambier." Oral evidence is admissible to show that a "bale" of gambier is a package compressed, and weighing 2 cwt.[3]

(*c*) A, a sculptor, leaves to B "all the marble in the yard, the tools in the shop, bankers, mod tools for carving." Evidence to show whether "mod" meant models, moulds, or modelling-tools, and to show what bankers are, may be given.[4]

(*d*) Evidence may not be given to show that the word "boats," in a policy of insurance, means "boats not slung on the outside of the ship on the quarter."[5]

(*e*) A leaves an estate to K, L, M, &c., by a will dated before 1838. Eight years afterwards A declares that by these letters he meant particular persons. Evidence of this declaration is not admissible. Proof that A was in the habit of calling a particular person M would have been admissible.[6]

(*f*) A leaves a legacy to——. Evidence to show how the blank was intended to be filled is not admissible.[7]

(*g*) Property was conveyed in trust in 1704 for the support of

[1] Illustration (*p*).

[2] *Smith* v. *Wilson*, 1832, 3 B. & Ad. 728.

[3] *Gorrissen* v. *Perrin*, 1857, 2 C. B. (N. S.) 681.

[4] *Goblet* v. *Beechey*, 1831, 3 Sim. 24; 2 Russ. & Myl. 624.

[5] *Blackett* v. *Royal Exchange Co.*, 1832, 2 C. & J. 244.

[6] *Clayton* v. *Lord Nugent*, 1844, 13 M. & W. 200; see 207–8.

[7] *Baylis* v. *A. G.*, 1741, 2 Atk. 239. In *In re Bacon's Will*, *Camp* v. *Coe*, 1886, 31 Ch. Div. 460, blanks were left in a will, and parol evidence was admitted to rebut any presumption arising from them against the *primâ facie* claim of the executor to the residue undisposed of.

"Godly preachers of Christ's holy Gospel." Evidence may be given to show what class of ministers were at the time known by that name.[1]

(*h*) A leaves property to his "children." If he has both legitimate and illegitimate children the whole of the property will go to the legitimate children. If he has only illegitimate children, the property may go to them, if he cannot have intended to give it to unborn legitimate children.[2]

(*i*) A testator leaves all his estates in the county of Limerick and city of Limerick to A. He had no estates in the county of Limerick, but he had estates in the county of Clare, of which the will did not dispose. Evidence cannot be given to show that the words "of Clare" had been erased from the draft by mistake, and so omitted from the will as executed.[3]

(*j*) A leaves a legacy to "Mrs. and Miss Bowden." No such persons were living at the time when the legacy was made, but Mrs. Washburne, whose maiden name had been Bowden, was living, and had a daughter, and the testatrix used to call them Bowden. Evidence of these facts was admitted.[4]

(*k*) A devises land to John Hiscocks, the eldest son of John Hiscocks. John Hiscocks had two sons, Simon, his eldest, and John, his second son, who, however, was the eldest son by a second marriage. The circumstances of the family, but not the testator's declarations of intention, may be proved in order to show which of the two was intended.[5]

(*l*) A devises property to Elizabeth, the natural daughter of B. B has a natural son John, and a legitimate daughter Elizabeth. The Court may infer from the circumstances under which the natural child was born, and from the testator's relationship to the putative father, that he meant to provide for John.[6]

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[1] *Shore* v. *Wilson*, 1842, 9 C. & F. 356, 365 *et seq.*

[2] Wig. Ext. Ev. pp. 18 and 19, and note of cases.

[3] *Miller* v. *Travers*, 1832, 8 Bing. 244.

[4] *Lee* v. *Pain*, 1845, 4 Hare, 251–3.

[5] *Doe* v. *Hiscocks*, 1839, 5 M. & W. 363. Cf. *In re Fish*, *Ingram* v. *Rayner*, [1894], 2 Ch. D. 83, where F devised property to his niece, E. W. He had no niece so named, but had two grand-nieces of that name, one legitimate, the other illegitimate; evidence of the surrounding circumstances tending to show that the illegitimate niece was meant was not admitted.

[6] *Ryall* v. *Hannam*, 1847, 10 Beav. 536.

(*m*) A leaves a legacy to his niece, Elizabeth Stringer. At the date of the will he had no such niece, but he had a great-great-niece named Elizabeth Jane Stringer. The Court may infer from these circumstances that Elizabeth Jane Stringer was intended; but they may not refer to instructions given by the testator to his solicitor, showing that the legacy was meant for a niece, Elizabeth Stringer, who had died before the date of the will, and that it was put into the will by a mistake on the part of the solicitor.[1]

(*n*) A devises one house to George Gord the son of George Gord, another to George Gord the son of John Gord, and a third to George Gord the son of Gord. Evidence both of the circumstances and of the testator's statements of intention may be given to show which of the two George Gords he meant.[2]

(*o*) A appointed "Percival —— of Brighton, Esquire, the father," one of his executors. Evidence of surrounding circumstances may be given to show who was meant, and (probably) evidence of statements of intention.[3]

(*p*) A leaves two legacies of the same amount to B, assigning the same motive for each legacy, one being given in his will, the other in a codicil. The Court presumes that they are not meant to be cumulative, but the legatee may show, either by proof of surrounding circumstances, or of declarations by the testator that they were.[4]

ARTICLE 92.*

CASES TO WHICH ARTICLES 90 AND 91 DO NOT APPLY.

Articles 90 and 91 apply only to parties to documents, and their representatives in interest, and only to cases in which some civil right or civil liability is dependent upon the

* See Note XXXIV.

[1] *Stringer* v. *Gardiner*, 1859, 27 Beav. 35; 4 De G. & J. 468.

[2] *Doe* v. *Needs*, 1836, 2 M. & W. 129.

[3] *In the goods of De Rosaz*, 1877, L. R. 2 P. D. 66.

[4] *Per* Leach, V.C., in *Hurst* v. *Leach*, 1821, 5 Madd. 351, 360–1. The rule in this case was vindicated, and a number of other cases both before and after it were elaborately considered by Lord St. Leonards, when Chancellor of Ireland, in *Hall* v. *Hall*, 1841, 1 Dru. & War. 94, 111–133. See, too, *Jenner* v. *Hinch*, 1879, 5 Prob. Div. 106.

terms of a document in question. Any person other than a party to a document or his representative in interest may, notwithstanding the existence of any document, prove any fact which he is otherwise entitled to prove; and any party to any document or any representative in interest of any such party may prove any such fact for any purpose other than that of varying or altering any right or liability depending upon the terms of the document.

Illustrations.

(*a*) The question is, whether A, a pauper, is settled in the parish of Cheadle. A deed of conveyance to which A was a party is produced, purporting to convey land to A for a valuable consideration. The parish appealing against the order was allowed to call A as a witness to prove that no consideration passed.[1]

(*b*) The question is, whether A obtained money from B under false pretences. The money was obtained as a premium for executing a deed of partnership, which deed stated a consideration other than the one which constituted the false pretence. B may give evidence of the false pretence although he executed the deed mis-stating the consideration for the premium.[2]

[1] *R.* v. *Cheadle*, 1832, 3 B. & Ad. 833.
[2] *R.* v. *Adamson*, 1843, 2 Moody, 286.

PART III.

PRODUCTION AND EFFECT OF EVIDENCE.

CHAPTER XIII.*

BURDEN OF PROOF.

ARTICLE 93.†

HE WHO AFFIRMS MUST PROVE.

WHOEVER desires any Court to give judgment as to any legal right or liability dependent on the existence or non-existence of facts which he asserts or denies to exist, must prove that those facts do or do not exist.[1]

ARTICLE 94.†

PRESUMPTION OF INNOCENCE.

If the commission of a crime is directly in issue in any proceeding, criminal or civil, it must be proved beyond reasonable doubt.

The burden of proving that any person has been guilty of a crime or wrongful act is on the person who asserts it, whether the commission of such act is or is not directly in issue in the action.

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* See Note XXXV. † See Note XXXVI.

[1] 1 Ph. Ev. 552; Taylor, s. 364 (from Greenleaf); Best, ss. 265-6; Starkie, 585-6.

Illustrations.

(*a*) A sues B on a policy of fire insurance. B pleads that A burnt down the house insured. B must prove his plea as fully as if A were being prosecuted for arson.[1]

(*b*) A sues B for damage done to A's ship by inflammable matter loaded thereon by B without notice to A's captain. A must prove the absence of notice.[2]

(*c*) The question in 1819 is, whether A is settled in the parish of a man to whom she was married in 1813. It is proved that in 1812 she was married to another person, who enlisted soon afterwards, went abroad on service, and had not been heard of afterwards. The burden of proving that the first husband was alive at the time of the second marriage is on the person who asserts it.[3]

ARTICLE 95.

ON WHOM THE GENERAL BURDEN OF PROOF LIES.

The burden of proof in any proceeding lies at first on that party against whom the judgment of the Court would be given if no evidence at all were produced on either side, regard being had to any presumption which may appear upon the pleadings. As the proceeding goes on, the burden of proof may be shifted from the party on whom it rested at first by his proving facts which raise a presumption in his favour.[4]

Where there are conflicting presumptions, the case is the same as if there were conflicting evidence.[5]

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[1] *Thurtell* v. *Beaumont*, 1823, 1 Bing. 339.

[2] *Williams* v. *East India Co.*, 1802, 3 Ea. 192, 198-9.

[3] *R.* v. *Twyning*, 1819, 2 B. & Ald. 386.

[4] 1 Ph. Ev. 552; Taylor, ss. 365, 366; Starkie, 586-7 & 748; Best, s. 268; and see *Abrath* v. *N. E. Ry.*, 1883, 11 Q. B. D. 440, especially the judgment of Bowen, L.J., 455-462.

[5] See Illustration (*i*).

Illustrations.

(*a*) It appears upon the pleadings that A is indorsee of a bill of exchange. The presumption is that the indorsement was for value, and the party interested in denying this must prove it.[1]

(*b*) A, a married woman, is accused of theft, and pleads not guilty. The burden of proof is on the prosecution. She is shown to have been in possession of the stolen goods soon after the theft. The burden of proof is shifted to A. She shows that she stole them in the presence of her husband. The burden of proving that she was not coerced by him is shifted to the prosecutor.[2]

(*c*) A is indicted for bigamy. On proof by the prosecution of the first marriage, A proves that at the time he was a minor. This throws on the prosecution the burden of proving the consent of A's parents.[3]

(*d*) A deed of gift is shown to have been made by a client to his solicitor. The burden of proving that the transaction was in good faith is on the solicitor.[4]

(*e*) It is shown that a hedge stands on A's land. The burden of proving that the ditch adjacent to it was not A's also is on the person who denies that the ditch belongs to A.[5]

(*f*) A proves that he received the rent of land. The presumption is, that he is owner in fee simple, and the burden of proof is on the person who denies it.[6]

(*g*) A finds a jewel mounted in a socket, and gives it to B to look at. B keeps it, and refuses to produce it on notice, but returns the socket. The burden of proving that it is not as valuable a stone of the kind as would go into the socket is on B.[7]

(*h*) A sues B on a policy of insurance, and shows that the vessel insured went to sea, and that after a reasonable time no tidings of her have been received, but that her loss has been rumoured. The burden of proving that she has not foundered is on B.[8]

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[1] *Mills* v. *Barber*, 1836, 1 M. & W. 425.

[2] Russ. Cri. 91 *et seq.*

[3] *R.* v. *Butler*, 1803, 1 R. & R. 61.

[4] 1 Story, Eq. Juris., s. 310, n. c. Quoting *Hunter* v. *Atkins*, 1832, 3 M. & K. 113.

[5] *Guy* v. *West*, 1808, Selw. N. P. 1244.

[6] *Doe* v. *Coulthred*, 1837, 7 A. & E. 235.

[7] *Armoury* v. *Delamirie*, 1721, 1 S. L. C. 353.

[8] *Koster* v. *Reed*, 1826, 6 B. & C. 19.

(*i*) Z in 1864 married A. In 1868 he was convicted of bigamy in having in 1868 married B during the life of A. In 1879 he married C. In 1880, C being alive, he married D, and was prosecuted for bigamy in marrying D in the lifetime of C. The prisoner on his second trial proved the first conviction, thereby proving that A was living in 1868. No further evidence was given. A's being alive in 1868 raises a presumption that she was living in 1879. Z's marriage to C in 1879 being presumably innocent, raises a presumption that A was then dead. The inference ought to have been left to the jury.[1]

ARTICLE 96.

BURDEN OF PROOF AS TO PARTICULAR FACT.

The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the burden of proving the fact shall lie on any particular person;[2] but the burden may in the course of a case be shifted from one side to the other, and in considering the amount of evidence necessary to shift the burden of proof the Court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively.

Illustrations.

(*a*) A prosecutes B for theft, and wishes the Court to believe that B admitted the theft to C. A must prove the admission.

B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

(*b*) A, a shipowner, sues B, an underwriter, on a policy of insurance on a ship. B alleges that A knew of and concealed from B material facts. B must give enough evidence to throw upon A the burden of disproving his knowledge; but slight evidence will suffice for this purpose.[3]

[1] *R.* v. *Willshire*, 1881, 6 Q. B. D. 366.

[2] For instances of such provisions, see Taylor, s. 372, n. 6.

[3] *Elkin* v. *Janson*, 1845, 13 M. & W. 655. See, especially, the judgment of Alderson, B., 663-6.

(*c*) In an action for malicious prosecution the plaintiff must prove (1) his innocence; (2) want of reasonable and probable cause for the prosecution; (3) malice or indirect motive; and he must prove all that is necessary to establish each proposition sufficiently to throw the burden of disproving that proposition on the other side.[1]

(*d*) In actions for penalties under the old game laws, though the plaintiff had to aver that the defendant was not duly qualified, and was obliged to give general evidence that he was not, the burden of proving any definite qualification was on the defendant.[2]

ARTICLE 97.

BURDEN OF PROVING FACT TO BE PROVED TO MAKE EVIDENCE ADMISSIBLE.

The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Illustrations.

(*a*) A wishes to prove a dying declaration by B.

A must prove B's death, and the fact that he had given up all hope of life when he made the statement.

(*b*) A wishes to prove, by secondary evidence, the contents of a lost document.

A must prove that the document has been lost.

ARTICLE 97A.

BURDEN OF PROOF WHEN PARTIES STAND IN A FIDUCIARY RELATION.

When persons stand in a relation to each other of such a nature that the one reposes confidence in the other, or is

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[1] *Abrath* v. *North Eastern Railway*, 1883, 11 Q. B. D. 440.

[2] 1 Ph. Ev. 556, and cases there quoted: but now see 42 & 43 Vict. c. 49, s. 39. The illustration is founded more particularly on *R.* v. *Jarvis*, in a note to *R.* v. *Stone*, 1757, 1 Ea. 639, where Lord Mansfield's language appears to imply what is stated above.

placed by circumstances under his authority, control, or influence, when the question is as to the validity of any transaction between them from which the person in whom confidence is reposed or in whom authority or influence is vested derives advantage, the burden of proving that the confidence, authority, or influence was not abused, and that the transaction was in good faith and valid, is on the person in whom such confidence or authority or influence is vested, and the nature and amount of the evidence required for this purpose depends upon the nature of the confidence or authority, and on the character of the transaction.[1]

[1] See Story's 'Equity,' para. 307 and following. Also Taylor, s. 151 and following. The illustrations of the principle are innumerable, and very various.

CHAPTER XIV.

ON PRESUMPTIONS AND ESTOPPELS.[*]

ARTICLE 98.

PRESUMPTION OF LEGITIMACY.

THE fact that any person was born during the continuance of a valid marriage between his mother and any man, or within such a time after the dissolution thereof and before the celebration of another valid marriage, that his mother's husband could have been his father, is conclusive proof that he is the legitimate child of his mother's husband, unless it can be shown—

either that his mother and her husband had no access to each other at any time when he could have been begotten, regard being had both to the date of the birth and to the physical condition of the husband,

or that the circumstances of their access (if any) were such as to render it highly improbable that sexual intercourse took place between them when it occurred.

Neither the mother nor the husband is a competent witness as to the fact of their having or not having had sexual intercourse with each other (unless the proceedings in the course of which the question arises are proceedings instituted in consequence of adultery[1]), nor are any declarations by them upon that subject deemed to be relevant facts

[*] See Note XXXV.

[1] 32 & 33 Vict. c. 68, s. 3.

when the legitimacy of the woman's child is in question, whether the mother or her husband can be called as a witness or not, provided that in applications for affiliation orders when proof has been given of the non-access of the husband at any time when his wife's child could have been begotten, the wife may give evidence as to the person by whom it was begotten.[1] Letters written by the mother may, as part of the *res gestæ*, be admissible evidence to show illegitimacy, though the mother could not be called as a witness to prove the statements contained in such letters.[2]

ARTICLE 99.

PRESUMPTION OF DEATH FROM SEVEN YEARS' ABSENCE.

A person shown not to have been heard of for seven years by those (if any) who if he had been alive would naturally have heard of him, is presumed to be dead unless the circumstances of the case are such as to account for his not being heard of without assuming his death; but there is no presumption as to the time when he died, and the

[1] *R.* v. *Luffe*, 1807, 8 Ea. 190, at p. 207; *Cope* v. *Cope*, 1833, 1 Mo. & Ro. 269 and at p. 273; *Legge* v. *Edmonds*, 1856, 25 L. J. Eq. 125, see p. 135; *R.* v. *Mansfield*, 1841, 1 Q. B. 444; *Morris* v. *Davies*, 1825, 3 C. & P. 215. See, as an illustration of these principles, *Hawes* v. *Draeger*, 1883, 23 Ch. Div. 173. I am not aware of any decision as to the paternity of a child born say six months after the death of one husband, and three months after the mother's marriage to another husband. Amongst common soldiers in India such a question might easily arise. The rule in European regiments is that a widow not remarried within the year (it used to be six months) must leave the regiment; the result was and is that widowhoods are usually very short.

[2] *Aylesford Peerage Case*, 1885, 11 App. Ca. 1, in which the general rule stated above is considered and affirmed.

burden of proving his death at any particular time is upon the person who asserts it.[1]

There is no presumption as to the age at which a person died who is shown to have been alive at a given time, or as to the order in which two or more persons died who are shown to have died in the same accident, shipwreck, or battle.[2]

ARTICLE 100.

*PRESUMPTION OF LOST GRANT.

When it has been shown that any person has, for a long period of time, exercised any proprietary right which might have had a lawful origin by grant or licence from the Crown or from a private person, and the exercise of which might and naturally would have been prevented by the persons interested if it had not had a lawful origin, there is a presumption that such right had a lawful origin and that it was created by a proper instrument which has been lost.

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* The subject of the doctrine of lost grants is much considered in *Angus* v. *Dalton*, 3 Q. B. D. 84, 1881, 6 App. Cas. 740.

[1] *McMahon* v. *McElroy*, 1869, 5 Ir. Rep. Eq. 1; *Hopewell* v. *De Pinna*, 1809, 2 Camp. 113; *Nepean* v. *Doe*, 1837, 2 S. L. C. 542, 632; *Nepean* v. *Knight*, 1837, 2 M. & W. 894, 912; *R.* v. *Lumley*, 1869, 1 C. C. R. 196; and see the caution of Lord Denman in *R.* v. *Harborne*, 1835, 2 A. & E. at p. 544. All the cases are collected and considered in *In re Phené's Trust*, 1869, 5 Ch. App. 139. The doctrine is also much discussed in *Prudential Assurance Company* v. *Edmonds*, 1877, 2 App. Cas. 487. The principle is stated to the same effect as in the text in *Re Corbishley's Trusts*, 1880, 14 Ch. Div. 846.

[2] *Wing* v. *Angrave*, 1860, 8 H. L. C. 183, 198; and see authorities in last note.

Illustrations.

(*a*) The question is, whether B is entitled to recover from A the possession of lands which A's father and mother successively occupied from 1754 to 1792 or 1793, and which B had occupied (without title) from 1793 to 1809. The lands formed originally an encroachment on the Forest of Dean.

The undisturbed occupation for thirty-nine years raises a presumption of a grant from the Crown to A's father.[1]

(*b*) A fishing mill-dam was erected more than 110 years before 1861 in the River Derwent, in Cumberland (not being navigable at that place), and was used for more than sixty years before 1861 in the manner in which it was used in 1861. This raises a presumption that all the upper proprietors whose rights were injuriously affected by the dam had granted a right to erect it.[2]

(*c*) A borough corporation proved a prescriptive right to a several oyster fishery in a navigable tidal river. The free inhabitants of ancient tenements in the borough proved that from time immemorial and claiming as of right they had dredged for oysters, within the limits of the fishery, from Feb. 2 to Easter Eve in each year. The Court presumed a grant from the Crown to the corporation before legal memory of a several fishery, with a condition in it that the free inhabitants of ancient tenements in the borough should enjoy such a right.[3]

(*d*) A builds a windmill near B's land in 1829, and enjoys a free current of air to it over B's land as of right, and without interruption till 1860. This enjoyment raises no presumption of a grant by B of a right to such a current of air, as it would not be natural for B to interrupt it.[4]

(*e*) No length of enjoyment of water, percolating through underground

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[1] *Goodtitle* v. *Baldwin*, 1809, 11 Ea. 488. The presumption was rebutted in this case by an express provision of 20 Ch. II. c. 3, avoiding grants of the Forest of Dean.

[2] *Leconfield* v. *Lonsdale*, 1870, L. R. 5 C. P. 657.

[3] *Goodman* v. *Mayor of Saltash*, 1882, 7 App. Ch. 633 (see especially 650). Lord Blackburn dissented on the ground that such a grant would not have been legal (pp. 651–62). See same case in 1881, 7 Q. B. D. 106, and 1880, 5 C. P. D. 431, both of which were reversed.

[4] *Webb* v. *Bird*, 1863, 13 C. B. (N. S.) 841.

undefined passages, raises a presumption of a grant from the owners of the ground under which the water so percolates of a right to the water.[1]

ARTICLE 101.*

PRESUMPTION OF REGULARITY AND OF DEEDS TO COMPLETE TITLE.

When any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with.

When a person in possession of any property is shown to be entitled to the beneficial ownership thereof, there is a presumption that every instrument has been executed which it was the legal duty of his trustees to execute in order to perfect his title.[2]

ARTICLE 102.†

ESTOPPEL BY CONDUCT.

When one person by anything which he does or says, or abstains from doing or saying, intentionally causes or permits another person to believe a thing to be true, and to act upon such belief otherwise than but for that belief he would have acted, neither the person first mentioned nor his representative in interest is allowed, in any suit or proceeding between himself and such person or his representative in interest, to deny the truth of that thing.

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* See Note XXXVII., and *Macdougall* v. *Purrier*, 1830, 2 Dow & Cl. 135, 433. *R.* v. *Cresswell*, 1876, 1 Q. B. D. (C. C. R.) 446, is a modern illustration of the effect of this presumption.

† See Note XXXVIII.

[1] *Chasemore* v. *Richards*, 1859, 7 H. L. C. 349.

[2] *Doe* d. *Hammond* v. *Cooke*, 1829, 6 Bing. 174, 179.

When any person under a legal duty to any other person to conduct himself with reasonable caution in the transaction of any business neglects that duty, and when the person to whom the duty is owing alters his position for the worse because he is misled as to the conduct of the negligent person by a fraud, of which such neglect is in the natural course of things the proximate cause, the negligent person is not permitted to deny that he acted in the manner in which the other person was led by such fraud to believe him to act.

Illustrations.

(*a*) A, the owner of machinery in B's possession, which is taken in execution by C, abstains from claiming it for some months, and converses with C's attorney without referring to his claim, and by these means impresses C with the belief that the machinery is B's. C sells the machinery. A is estopped from denying that it is B's.[1]

(*b*) A, a retiring partner of B, gives no notice to the customers of the firm that he is no longer B's partner. In an action by a customer, he cannot deny that he is B's partner.[2]

(*c*) A sues B for a wrongful imprisonment. The imprisonment was wrongful, if B had a certain original warrant; rightful, if he had only a copy. B had in fact a copy. He led A to believe that he had the original, though not with the intention that A should act otherwise than he actually did. B may show that he had only a copy and not the original.[3]

(*d*) A sells eighty quarters of barley to B, but does not specifically appropriate to B any quarters. B sells sixty of the eighty quarters to C. C informs A, who assents to the transfer. C being satisfied with this, says nothing further to B as to delivery. B becomes bankrupt. A cannot, in an action by C to recover the barley, deny that he holds for C on the ground that, for want of specific appropriation, no property passed to B.[4]

(*e*) A signs blank cheques and gives them to his wife to fill up as she

[1] *Pickard* v. *Sears*, 1837, 6 A. & E. 469, 474.
[2] (Per Parke, B.) *Freeman* v. *Cooke*, 1848, 2 Ex. 663.
[3] *Howard* v. *Hudson*, 1853, 2 E. & B. 1.
[4] *Knights* v. *Wiffen*, 1870, L. R. 5 Q. B. 660.

wants money. A's wife fills up a cheque for £50 2*s*. so carelessly that room is left for the insertion of figures before the 50 and for the insertion of words before the "fifty." She then gives it to a clerk of A's to get it cashed. He wrote 3 before 50, and "three hundred and" before "fifty." A's banker pays the cheque so altered in good faith. A cannot recover against the banker.[1]

(*f*) A railway company negligently issues two delivery orders for the same wheat to A, who fraudulently raises money from B as upon two consignments of different lots of wheat. The railway is liable to B for the amount which A fraudulently obtained by the company's negligence.[2]

(*g*) A carelessly leaves his door unlocked, whereby his goods are stolen. He is not estopped from denying the title of an innocent purchaser from the thief.[3]

ARTICLE 103.

ESTOPPEL OF TENANT AND LICENSEE.

No tenant and no person claiming through any tenant of any land or hereditament of which he has been let into possession, or for which he has paid rent, is, till he has given up possession, permitted to deny that the landlord had, at the time when the tenant was let into possession or paid the rent, a title to such land or hereditament;[4] and no person who came upon any land by the licence of the person in possession thereof, is, whilst he remains on it, permitted to deny that such person had a title to such possession at the time when such licence was given.[5]

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[1] *Young* v. *Groate*, 1827, 4 Bing. 253.

[2] *Coventry* v. *G. E. R.*, 1883, 11 Q. B. D. 776.

[3] Per Blackburn, J., in *Swan* v. *N. B. Australasian Co.*, 1863, 2 H. & C. 181. See *Baxendale* v. *Bennett*, 1878, 3 Q. B. D. 525. The earlier cases on the subject are much discussed in *Jorden* v. *Money*, 1854, 5 H. L. Ca. 200–16, 249–257.

[4] *Doe* v. *Barton*, 1840, 11 A. & E. 307; *Doe* v. *Smyth*, 1815, 4 M. & S. 347; *Doe* v. *Pegg*, 1785, 1 T. R. 760 (note).

[5] *Doe* v. *Baytup*, 1835, 3 A. & E. 188.

ARTICLE 104.

ESTOPPEL OF ACCEPTOR OF BILL OF EXCHANGE.

No acceptor of a bill of exchange is permitted to deny the signature of the drawer or his capacity to draw, or if the bill is payable to the order of the drawer, his capacity to endorse the bill, though he may deny the fact of the endorsement;[1] nor if the bill be drawn by procuration, the authority of the agent, by whom it purports to be drawn, to draw in the name of the principal,[2] though he may deny his authority to endorse it.[3] If the bill is accepted in blank, the acceptor may not deny the fact that the drawer endorsed it.[4]

ARTICLE 105.

ESTOPPEL OF BAILEE, AGENT, AND LICENSEE.

No bailee, agent, or licensee is permitted to deny that the bailor, principal, or licensor, by whom any goods were entrusted to any of them respectively was entitled to those goods at the time when they were so entrusted.

Provided that any such bailee, agent, or licensee may show that he was compelled to deliver up any such goods to some person who had a right to them as against his bailor, principal, or licensor, or that his bailor, principal, or licensor, wrongfully and without notice to the bailee, agent, or licensee, obtained the goods from a third person who has claimed them from such bailee, agent, or licensee.[5]

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[1] *Garland* v. *Jacomb*, 1873, L. R. 8 Ex. 216.
[2] *Sanderson* v. *Collman*, 1842, 4 M. & G. 209.
[3] *Robinson* v. *Yarrow*, 1817, 7 Tau. 455.
[4] *L. & S. W. Bank* v. *Wentworth*, 1880, 5 Ex. D. 96.
[5] *Dixon* v. *Hammond*, 1819, 2 B. & A. 310; *Crossley* v. *Dixon*,

Every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel, is conclusive proof of that shipment as against the master or other person signing the same, notwithstanding that some goods or some part thereof may not have been so shipped, unless such holder of the bill of lading had actual notice at the time of receiving the same that the goods had not been in fact laden on board, provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper or of the holder or some person under whom the holder holds.[1]

1863, 10 H. L. C. 293; *Gosling* v. *Birnie*, 1831, 7 Bing. 339; *Hardman* v. *Wilcock*, 1832 (?), 9 Bing. 382 (n.); *Biddle* v. *Bond*, 1865, 34 L. J. Q. B. 137; *Wilson* v. *Anderton*, 1830, 1 B. & Ad. 450. As to carriers, see *Sheridan* v. *New Quay*, 1858, 4 C. B. (N. S.) 618.

[1] 18 & 19 Vict. c. 111, s. 3.

CHAPTER XV.

*OF THE COMPETENCY OF WITNESSES.**

ARTICLE 106.

WHO MAY TESTIFY.

ALL persons are competent to testify in all cases except as hereinafter excepted.

ARTICLE 107.†

WHAT WITNESSES ARE INCOMPETENT.

A witness is incompetent if in the opinion of the judge he is prevented by extreme youth, disease affecting his mind, or any other cause of the same kind, from recollecting the matter on which he is to testify, from understanding the questions put to him, from giving rational answers to those questions, or from knowing that he ought to speak the truth.

A witness unable to speak or hear is not incompetent, but may give his evidence by writing or by signs, or in any other manner in which he can make it intelligible; but such writing must be written and such signs made in open Court. Evidence so given is deemed to be oral evidence.

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* See Note XXXIX.

† See Note XL. A witness under sentence of death was said to be incompetent in *R.* v. *Webb*, 1867, 11 Cox, 133, *sed quere*.

ARTICLE 108.*[1]

COMPETENCY IN CRIMINAL CASES.

In criminal cases the accused person, and his or her wife or husband, and every person and the wife or husband of every person jointly indicted with him, and tried at the same

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* See Note XLI.

[1] The Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), by sect. 6, applies "to all criminal proceedings notwithstanding any enactment in force at the commencement of this Act," except proceedings for non-repair of highways, etc. (see *post*), and Court Martials, unless it is applied to them by general orders under the Naval Discipline Act, 1866 (29 & 30 Vict. c. 109), s. 65, or rules under the Army Act, 1882 (44 & 45 Vict. c. 58), s. 70. By sect. 7 it does not extend to Ireland. The enactments referred to in sect. 6 are contained in a number of Statutes, which, before 1898, made accused persons and their wives or husbands competent witnesses to different extents, in different specified cases. It seems probable that subsequent Statute Law Revision Acts will repeal these enactments. Those now in force, and subject to this section, are The Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 34 (4); The Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 21; The Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 11; The Threshing Machines Accidents Prevention Act, 1878 (41 & 42 Vict. c. 12), s. 3; The Army Act, 1882 (44 & 45 Vict. c. 58), s. 156 (3); The Explosives Act, 1883 (46 & 47 Vict. c. 3), s. 4 (2); The Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), s. 53; The Married Women's Property Act, 1884 (47 & 48 Vict. c. 14), s. 1, as to which see *post* in the above article; The Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 20; The Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 10 (1); The Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 9; The Prevention of Cruelty to Children Act, 1904 (4 Edw. 7, c. 15), s. 12; The Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 24; The Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 57 (3); The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 694; The Law of Distress Amendment Act, 1895 (58 & 59 Vict. c. 24), s. 5; The False Alarms of Fire Act, 1895 (58 & 59 Vict. c. 28), s. 2; The Corrupt and Illegal Practices Prevention Act, 1895 (58 & 59 Vict. c.

time,[1] is incompetent to testify;[2] except as hereinafter mentioned.

Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, is a competent witness for the defence at every stage of the proceedings,[3] whether the person so charged is charged solely or jointly with any other person; provided—

a person so charged shall not be called as a witness except upon his own application; and

the wife or husband of a person so charged cannot be called as a witness except upon the application of the person so charged.[4]

But the wife or husband of a person charged may be called as a witness either for the prosecution or defence, and without the consent of the person charged, if he is charged with—

(*a*) an offence under any enactment mentioned in the footnote hereto;[5] or

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40), s. 2; The Chaff-cutting Machines (Accidents) Act, 1897 (60 & 61 Vict. c. 60), s. 5.

[1] Not if they are tried separately; *Windsor* v. *R.*, 1866, L. R. 1 Q. B. 390; *Re Bradlaugh*, 15 Cox, 257.

[2] *R.* v. *Payne*, 1872, 1 C. C. R. 349; and *R.* v. *Thompson*, 1872, *ib.* 377.

[3] This does not include proceedings before a Grand Jury; *R.* v. *Rhodes*, [1899], 1 Q. B. 77.

[4] 61 & 62 Vict. c. 36, s. 1 (a) (c).

[5] *Ib.* ss. 1 (c), 4. The enactments referred to are set out in the Schedule to the Act, being The Vagrancy Act, 1824 (5 Geo. IV. c. 83), the enactment punishing a man for neglecting to maintain or deserting his wife or any of his family; The Poor Law (Scotland) Act, 1845 (8 & 9 Vict. c. 83), s. 80, relating to the like or neglect to maintain an illegitimate child; The Offences against the Person Act, 1861

(*b*) an offence as to which the wife or husband of the person charged may by common law be called as a witness without his or her consent, *i.e.* an offence consisting of any bodily injury or violence inflicted on his or her wife or husband.[1]

In any such criminal proceeding against a husband or a wife, as is authorised by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75, ss. 12 and 16), the husband and wife respectively are competent and admissible witnesses, and except when defendant compellable to give evidence.[2]

The following proceedings at law are not criminal within the meaning of this article :—

(24 & 25 Vict. c. 100), ss. 48–55, relating to rape, indecent assault on a female, abduction; The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 12 and 16, relating to offences by a married man or woman against his wife's or her husband's property, as to which see *supra;* The Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69); and Part II. of the Children Act, 1908 (8 Edw. 7, c. 67, s. 27).

[1] 61 & 62 Vict. c. 36, ss. 1 (c.), 4; and as to the common law, see *R.* v. *Wakefield*, 1877, 2 Lew. 287; and *Reeve* v. *Wood*, 1864, 5 B. & S. 364. The common law has also been supposed to apply to treason, Taylor's Ev. s. 1372.

[2] 47 Vict. c. 14, s. 1, which must be read as subject to 61 & 62 Vict. c. 36, *ante;* and see the case of *R.* v. *Brittleton*, 1884, 12 Q. B. D. 266, which turns on the wording of the Act of 1882, and occasioned this enactment. The following doubt arises on the effect of this enactment. Does it mean (*a*) only that the wife is competent as against the husband, and the husband as against the wife, notwithstanding their marriage, or (*b*) that in such cases not only the prosecutor, though married to the prisoner, but the prisoner, though prisoner and though married, is to be competent, though the prisoner is not to be compellable? It is observable that the first "husband and wife" does not become "wife or husband" before the word "respectively," as would have been natural. It is also remarkable that in the Act of 1882 a criminal proceeding is described as "a remedy"—a very peculiar phrase.

Trials of indictments for the non-repair of public highways or bridges, or for nuisances to any public highway, river, or bridge;[1]

Proceedings instituted for the purpose of trying civil rights only;[1]

Proceedings on the Revenue side of the Exchequer Division of the High Court of Justice.[2]

ARTICLE 109.

COMPETENCY IN PROCEEDINGS RELATING TO ADULTERY.

In proceedings instituted in consequence of adultery, the parties and their husbands and wives are competent witnesses, provided that no witness in any [? such] proceeding, whether a party to the suit or not, is liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness has already given evidence in the same proceeding in disproof of his or her alleged adultery.[3]

ARTICLE 110.

COMMUNICATIONS DURING MARRIAGE.

No husband is compellable to disclose any communication made to him by his wife during the marriage, and no wife is compellable to disclose any communication made to her by her husband during the marriage.[4]

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[1] 40 & 41 Vict. c. 14. The provisions of this Act are not affected by The Criminal Evidence Act, 1898, 61 & 62 Vict. c. 36, s. 6; see *ante*, p. 124, note 1.

[2] 28 & 29 Vict. c. 104, s. 34.

[3] 32 & 33 Vict. c. 68, s. 3. The word "such" seems to have been omitted accidentally.

[4] 16 & 17 Vict. c. 83, s. 3, and 61 & 62 Vict. c. 36, s. 1, subs. (*d*). It

ARTICLE 111.*

JUDGES AND ADVOCATES PRIVILEGED AS TO CERTAIN QUESTIONS.

It is doubtful whether a judge is compellable to testify as to anything which came to his knowledge in court as such judge.[1] It seems that a barrister cannot be compelled to testify as to what he said in court in his character of a barrister.[2]

ARTICLE 112.

EVIDENCE AS TO AFFAIRS OF STATE.

No one can be compelled to give evidence relating to any affairs of State, or as to official communications between public officers upon public affairs, unless the officer at the head of the department concerned permits him to do so,[3] or to give evidence of what took place in either House of Parliament, without the leave of the House, though he may state that a particular person acted as Speaker.[4]

ARTICLE 113.

INFORMATION AS TO COMMISSION OF OFFENCES.

In cases in which the Government is immediately concerned, no witness can be compelled to answer any question,

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* See Note XLII.

is doubtful whether this would apply to a widower or divorced person, questioned after the dissolution of the marriage as to what had been communicated to him whilst it lasted.

[1] *R.* v. *Gazard*, 1838, 8 C. & P. 595.

[2] *Curry* v. *Walter*, 1796, 1 Esp. 456.

[3] *Beatson* v. *Skene*, 1860, 5 H. & N. 838.

[4] *Chubb* v. *Salomons*, 1852, 3 Car. & Kir. 77; *Plunkett* v. *Cobbett*, 1804, 5 Esp. 136.

the answer to which would tend to discover the names of persons by or to whom information was given as to the commission of offences.

A criminal prosecution by the Director of Public Prosecutions is a public prosecution, and the Director of Public Prosecutions cannot be required to say from whom he acquired information or what it was.[1]

In ordinary criminal prosecutions it is for the judge to decide whether the permission of any such question would or would not, under the circumstances of the particular case, be injurious to the administration of justice.[2]

ARTICLE 114.

COMPETENCY OF JURORS.

A petty juror may not[3] and it is doubtful whether a grand juror may[4] give evidence as to what passed between the jurymen in the discharge of their duties. It is also doubtful whether a grand juror may give evidence as to what any witness said when examined before the grand jury.

ARTICLE 115.*

PROFESSIONAL COMMUNICATIONS.

No legal adviser is permitted, whether during or after the termination of his employment as such, unless with his client's express consent, to disclose any communication,

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* See Note XLIII.

[1] *Marks* v. *Beyfus*, 1890, 25 Q. B. D. 494.

[2] *R.* v. *Hardy*, 1794, 24 S. T. 811; *A. G.* v. *Bryant*, 1846, 15 M. & W. 169; *R.* v. *Richardson*, 1863, 3 F. & F. 693.

[3] *Vaise* v. *Delaval*, 1785, 1 T. R. 11; *Burgess* v. *Langley*, 1843, 5 M. & G. 722.

[4] 1 Ph. Ev. 140; Taylor, s. 943.

oral or documentary, made to him as such legal adviser, by or on behalf of his client, during, in the course, and for the purpose of his employment, whether in reference to any matter as to which a dispute has arisen or otherwise, or to disclose any advice given by him to his client during, in the course, and for the purpose of such employment. It is immaterial whether the client is or is not a party to the action in which the question is put to the legal adviser.

This article does not extend to—

(1) Any such communication as aforesaid made in furtherance of any criminal purpose; whether such purpose was at the time of the communication known to the professional adviser or not;[1]

(2) Any fact observed by any legal adviser, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether his attention was directed to such fact by or on behalf of his client or not;

(3) Any fact with which such legal adviser became acquainted otherwise than in his character as such.

The expression "legal adviser" includes barristers and solicitors,[2] their clerks,[3] and interpreters between them and

[1] *R.* v. *Cox & Railton*, 1884, 14 Q. B. D. 153. The judgment in this case is that of ten judges in the Court for Crown Cases Reserved, and examines minutely all the cases on the subject. These cases put the rule on the principle, that the furtherance of a criminal purpose can never be part of a legal adviser's business. As soon as a legal adviser knowingly takes part in preparing for a crime, he ceases to act as a lawyer and becomes a criminal—a conspirator or accessory as the case may be.

[2] *Wilson* v. *Rastall*, 1792, 4 T. R. 753. As to interpreters, *Ib.* 756.

[3] *Taylor* v. *Foster*, 1825, 2 C. & P. 195; *Foote* v. *Hayne*, 1824,

their clients. It does not include officers of a corporation through whom the corporation has elected to make statements.[1]

Illustrations.

(*a*) A, being charged with embezzlement, retains B, a barrister, to defend him. In the course of the proceedings, B observes that an entry has been made in A's account book, charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of B's employment.

This being a fact observed by B in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, is not protected from disclosure in a subsequent action by A against the prosecutor in the original case for malicious prosecution.[2]

(*b*) If a legal adviser witnesses a deed, he must give evidence as to what happened at the time of its execution.[3]

(*c*) A retains B, an attorney, to prosecute C (whose property he had fraudulently acquired) for murder, and says, "It is not proper for me to appear in the prosecution for fear of its hurting me in the cause coming on between myself and him; but I do not care if I give £10,000 to get him hanged, for then I shall be easy in my title and estate." This communication is not privileged.[4]

ARTICLE 116.

CONFIDENTIAL COMMUNICATIONS WITH LEGAL ADVISERS.

No one can be compelled to disclose to the Court any communication between himself and his legal adviser, which his legal adviser could not disclose without his permission,

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1 C. & P. 545. *Quære*, whether licensed conveyancers are within the rule? Parke, B., in *Turquand* v. *Knight*, 1836, 2 M. & W. at p. 100, thought not. Special pleaders would seem to be on the same footing.

[1] *Mayor of Swansea* v. *Quirk*, 1879, 5 C. P. D. 106. Nor pursuivants of the Heralds' College; *Slade* v. *Tucker*, 1880, 14 Ch. Div. 824.

[2] *Brown* v. *Foster*, 1857, 1 H. & N. 736.

[3] *Crawcour* v. *Salter*, 1881, 18 Ch. Div. pp. 35-6.

[4] *Annesley* v. *Anglesea*, 1743, 17 S. T. 1223-44.

although it may have been made before any dispute arose as to the matter referred to :[1] but communications between a third party and a legal adviser are not protected unless the third party is acting as the agent of the person seeking advice, or the communications are made in contemplation of litigation, or for the purpose of giving advice or obtaining evidence with reference to it.[2]

ARTICLE 117.*

CLERGYMEN AND MEDICAL MEN.

Medical men[3] and [probably] clergymen may be compelled to disclose communications made to them in professional confidence.

ARTICLE 118.

PRODUCTION OF TITLE-DEEDS OF WITNESS NOT A PARTY.

No witness who is not a party to a suit can be compelled to produce his title-deeds to any property,[4] or any document the production of which might tend to criminate him, or expose him to any penalty or forfeiture ;[5] but a witness

* See Note XLIV.

[1] *Minet* v. *Morgan*, 1873, 8 Ch. App. 361, reviewing all the cases, and adopting the explanation given in *Pearse* v. *Pearse*, 1846, 1 De G. & S. 18–31, of *Radcliffe* v. *Fursman*, 1730, 2 Br. P. C. 514. An illustration will be found in *Mayor of Bristol* v. *Cox*, 1884, 26 Ch. Div. 678.

[2] *Wheeler* v. *Le Marchant*, 1881, 17 Ch. D. 675. See, too, *Calcraft* v. *Guest*, [1898], 1 Q. B. 759.

[3] *Duchess of Kingston's Case*, 1776, 20 S. T. 572–3. As to clergymen, see Note XLIV.

[4] *Pickering* v. *Noyes*, 1823, 1 B. & C. 263 ; *Adams* v. *Lloyd*, 1858, 3 H. & N. 351.

[5] *Whitaker* v. *Izod*, 1809, 2 Tau. 115.

is not entitled to refuse to produce a document in his possession only because its production may expose him to a civil action,[1] or because he has lien upon it.[2]

No bank is compellable to produce the books of such bank. except in the case provided for in Article 37.[3]

ARTICLE 119.

PRODUCTION OF DOCUMENTS WHICH ANOTHER PERSON, HAVING POSSESSION, COULD REFUSE TO PRODUCE.

No solicitor,[4] trustee, or mortgagee can be compelled to produce (except for the purpose of identification) documents in his possession as such, which his client, *cestui que trust*, or mortgagor would be entitled to refuse to produce if they were in his possession; nor can any one who is entitled to refuse to produce a document be compelled to give oral evidence of its contents.[5]

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[1] *Doe* v. *Date*, 1842, 3 Q. B. 609, 618.

[2] *Hope* v. *Liddell*, 1855, 7 De G. M. & G. 331; *Hunter* v. *Leathley*, 1830, 10 B. & C. 858; *Brassington* v. *Brassington*, 1823, 1 Si. & Stu. 455. It has been doubted whether production may not be refused on the ground of a lien as against the party requiring the production. This is suggested in *Brassington* v. *Brassington*, and was acted upon by Lord Denman in *Kemp* v. *King*, 1842, 2 Mo. & Ro. 437; but it seems to be opposed to *Hunter* v. *Leathley*, 1830, 10 B. & C. 858, in which a broker who had a lien on a policy for premiums advanced was compelled to produce it in an action against the underwriter by the assured who had created the lien. See *Ley* v. *Barlow*, 1848 (per Parke, B.), 1 Ex. 801.

[3] 42 & 43 Vict. c. 11, ss. 7, 10.

[4] *Volant* v. *Soyer*, 1853, 13 C. B. 231; *Phelps* v. *Prew*, 1854, 3 E. & B. 431.

[5] *Davies* v. *Waters*, 1842, 9 M. & W. 608; *Few* v. *Guppy*, 1834, 13 Beav. 457.

ARTICLE 120.

WITNESS NOT TO BE COMPELLED TO CRIMINATE HIMSELF.

No one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose the witness [or the wife or husband of the witness] to any criminal charge, or to any penalty or forfeiture which the judge regards as reasonably likely to be preferred or sued for.[1]

But no one is excused from answering any question only because the answer may establish or tend to establish that he owes a debt, or is otherwise liable to any civil suit, either at the instance of the Crown or of any other person,[2] nor does anything in ss. 75–84 of the Larceny Act, 1861 (now replaced by 6 & 7 Geo. 5, c. 50, ss. 20, 22, 21) relating to offences committed by bankers, agents, factors, trustees, directors and others, entitle any person to refuse to make a full and complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding in any Court, or upon the hearing of any matter in bankruptcy or insolvency.[3]

[1] *R.* v. *Boyes*, 1861, 1 B. & S. 330; followed and approved in *Ex parte Reynolds*, 1882, by the Court of Appeal; see 20 Ch. Div. 298. As to husbands and wives, see 1 Hale, P. C. 301; *R.* v. *Cliviger*, 1788, 2 T. R. 263; *Cartwright* v. *Green*, 1803, 8 Ve. 405; *R.* v. *Bathwick*, 1831, 2 B. & Ad. 639; *R.* v. *All Saints, Worcester*, 1817, 6 M. & S. 194. These cases show that even under the old law which made the parties and their husbands and wives incompetent witnesses, a wife was not incompetent to prove matter which might tend to incriminate her husband. *R.* v. *Cliviger* assumes that she was, and was to that extent overruled. As to the later law, see *R.* v. *Halliday*, 1860, Bell, 257. The cases, however, do not decide that if the wife claimed the privilege of not answering she would be compelled to do so, and to some extent they suggest that she would not.

[2] 46 Geo. III. c. 37. See *R.* v. *Scott*, 1856, 25 L. J. M. C. 128, and subsequent cases as to bankrupts, and *Ex parte Scholfield*, 1877, 6 Ch. Div. 230. *Quare*, Is he bound to produce a document incriminating himself? See *Webb* v. *East*, 1880, 5 Ex. D. 23 & 108.

[3] 24 & 25 Vict. c. 96, s. 85, but no person is liable to be convicted

A person charged with an offence and being a witness in pursuance of the Criminal Evidence Act, 1898, may be asked any question in cross-examination, notwithstanding that it would tend to criminate him as to the offence charged.[1]

ARTICLE 121.

CORROBORATION WHEN REQUIRED.*

No plaintiff in any action for breach of promise of marriage can recover a verdict, unless his or her testimony is corroborated by some other material evidence in support of such promise.[2] The fact that the defendant did not answer letters affirming that he had promised to marry the plaintiff is not such corroboration.[3]

No order against any person alleged to be the father of a bastard child can be made by any justices, or confirmed on appeal by any Court of Quarter Session, unless the evidence of the mother of the said bastard child is corroborated in some material particular to the satisfaction of the said justices or Court respectively.[4]

No person can be convicted of any offence upon the unsworn evidence of a child of tender years, unless such

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* See Article 122.

of any of the above mentioned offences to which must be added those under 6 & 7 Geo. 5, c. 50, ss. 6 and 7 (1), relating to the theft of wills and documents of title, "by any evidence whatever [in respect] of any act done by him, if previously to being charged he has disclosed such act on oath in consequence of any compulsory process, etc., *ibid.* and 6 & 7 Geo. 5, c. 50, s. 43 (2), and a statement or admission made in compulsory examination, &c., in bankruptcy shall not be admissible against him in a proceeding in respect of any such offences; 4 & 5 Geo. 5, c. 59, s. 166, and 6 & 7 Geo. 5, c. 50, s. 43 (2).

It is not easy to see why these enactments have not been consolidated. They are all to the same effect.

[1] 61 & 62 Vict. c. 36, s. 1 (*e*).

[2] 32 & 33 Vict. c. 68, s. 2.

[3] *Wiedemann* v. *Walpole*, [1891], 2 Q. B. 534.

[4] 8 & 9 Vict. c. 10, s. 6; 35 & 36 Vict. c. 65, s. 4.

unsworn evidence is corroborated by material evidence implicating the accused.[1]

When the only proof against a person charged with a criminal offence is the evidence of an accomplice, uncorroborated in any material particular, it is the duty of the judge to warn the jury that it is unsafe to convict any person upon such evidence, though they have a legal right to do so.[2]

ARTICLE 121A.

CLAIM ON ESTATE OF DECEASED PERSON.

Claims upon the estates of deceased persons, whether founded upon an allegation of debt or of gift, ought not to be maintained upon the uncorroborated testimony of the claimant, unless circumstances appear or are proved which make the claim antecedently probable, or throw the burden of disproving it on the representatives of the deceased.

Illustrations.

(*a*) A, a widow swore that her deceased husband gave her plate, &c., in his house, but no circumstances corroborated her allegation. Her claim was rejected.[3]

(*b*) A, a widow, claimed the rectification of a settlement drawn by her husband the night before their marriage, and giving him advantages which, as she swore, she did not mean to give him, and were not explained to her by him. The settlement was not one which, in the absence of agreement between the parties, would have been sanctioned by the Court. Her claim was admitted, though uncorroborated.[4]

[1] 48 & 49 Vict. c. 69, s. 4; 8 Edw. 7, c. 67, s. 30; 4 & 5 Geo. 5, c. 58, s. 28 (2). The above seems to be the effect of these enactments. The curious way in which this simple result has been arrived at may be seen in the statute book, but it is not worth while to explain it here. See Article 123A.

[2] 1 Ph. Ev. 93–101; Taylor, ss. 967–971; Russ. Cri. 2286–93. See *R.* v. *Baskerville* [1916] 2 K. B. 658, where the authorities on this point were fully considered by the Court of Criminal Appeal. The text of Art. 121A is as the author wrote it.

[3] *Finch* v. *Finch*, 1883, 23 Ch. Div. 267.

[4] *Livesey* v. *Smith*, 1880, 15 Ch. Div. 655. *In re Garnett, Gandy* v.

ARTICLE 122.

NUMBER OF WITNESSES.

In trials for high treason, or misprision of treason, no one can be indicted, tried, or attainted (unless he pleads guilty) except upon the oath of two lawful witnesses, either both of them to the same overt act, or one of them to one and another of them to another overt act of the same treason. If two or more distinct treasons of divers heads or kinds are alleged in one indictment, one witness produced to prove one of the said treasons and another witness produced to prove another of the said treasons are not to be deemed to be two witnesses to the same treason within the meaning of this article.[1]

This provision does not apply to cases of high treason in compassing or imagining the King's death, in which the overt act or overt acts of such treason alleged in the indictment are assassination or killing of the King, or any direct attempt against his life, or any direct attempt against his person, whereby his life may be endangered or his person suffer bodily harm,[2] or to misprision of such treason.

If upon a trial for perjury the only evidence against the defendant is the oath of one witness contradicting the oath on which perjury is assigned, and if no circumstances are proved which corroborate such witness, the defendant is entitled to be acquitted.[3]

Macaulay, 1885, 31 Ch. Div. 1, is a similar case. In *In re Hodgson*, *Beckett* v. *Ramsdale*, 1885, 31 Ch. Div. p. 183, the language of Hannen, J., in words somewhat relaxes the rule, but not, I think, in substance.

[1] 7 & 8 Will. III. c. 3, ss. 2, 4.

[2] 39 & 40 Geo. III. c. 93.

[3] Russ. Cri. 508, 2294.

CHAPTER XVI.

OF TAKING ORAL EVIDENCE, AND OF THE EXAMINATION OF WITNESSES.

ARTICLE 123.

EVIDENCE TO BE UPON OATH, EXCEPT IN CERTAIN CASES.

ALL oral evidence given in any proceeding must be given upon oath,[1] except as is stated in this and the following article.

Every person objecting to being sworn, and stating, as the ground of such objection, either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, may make his solemn affirmation, which is of the same force and effect as if he had taken the oath.

Such affirmation must be as follows :—

"I, A. B., do solemnly, sincerely, and truly declare and affirm,"

and then proceed with the words of the oath prescribed by

[1] The form and manner of administration of oaths depends upon pratice as modified by the Oaths Act, 1909, 9 Edw. 7, c. 37, s. 2, q.v.

law, omitting any words of imprecation or calling to witness.[1]

Where an oath has been duly administered and taken, the fact that the person to whom the same was administered had, at the time of taking such oath, no religious belief, does not for any purpose affect the validity of such oath.[2]

ARTICLE 123A.

UNSWORN EVIDENCE OF YOUNG CHILD.

[3] In any proceeding for any offence the evidence of any child of tender years who is tendered as a witness, and does not, in the opinion of the Court, understand the nature of an oath, may be received, though not given upon oath, if, in the opinion of the Court, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

And the evidence of the child, though not given on oath, but otherwise taken and reduced into writing, in

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[1] 51 & 52 Vict. c. 46, s. 2, the Oaths Act, 1888, which repeals the previous enactments on the subject, see 1 & 2 Geo. 5, c. 6, s. 15 (1), as to the penalty for giving false evidence.

[2] 51 & 52 Vict. c. 46, s. 3.

[3] 48 & 49 Vict. c. 69, s. 4; 8 Edw. 7, c. 67, s. 30; 4 Geo. 5, c. 58, s. 28 (2). The above seems to be the comparatively simple result of these enactments, except that if the unsworn evidence is admitted under 48 & 49 Vict. c. 69, s. 4 (The Criminal Law Amendment Act, 1885), which there is no reason for preferring to the other Statutes, the child is liable to be indicted if the evidence it gives is false. On the

accordance with the provisions of sect. 17 of the Indictable Offences Act, 1848,[1] or of Part II. of the Children Act, 1908,[2] shall be deemed to be a deposition within the meaning of those sections respectively.

Provided that—

(*a*) a person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused; and

(*b*) any child whose evidence is received as aforesaid and who shall wilfully give false evidence shall be liable on summary conviction to be adjudged such punishment as might be awarded had he been charged with perjury and the case dealt with summarily under section 10 of the Summary Jurisdiction Act, 1879.[3]

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terms of the Statutes "the girl in respect of whom the offence is charged to have been committed" under this Act, and the "child" in a similar position under 8 Edw. 7, c. 67, s. 30 (The Children Act, 1908), seem to be in the same position as "the other child of tender years" in both. As to 4 & 5 Geo. 5, c. 58, s. 28 (2), it does not seem worth while to reproduce the phrases that we have rendered as above, nor to recapitulate the offences specified in the earlier Statutes. The cases of *R.* v. *Wealand*, 1888, 20 Q. B. D. 827, and *R.* v. *Paul*, 1890, 25 Q. B. D. 202, seem now to be obsolete.

[1] See Article 140.

[2] See Article 141B.

[3] 8 Edw. 7, c. 67, s. 30.

ARTICLE 123B.

UNSWORN EVIDENCE OF A BARRISTER.

A barrister giving evidence in Court, in proceedings where evidence is usually given by affidavit, as to his action in his professional capacity in previous proceedings, makes a statement from his seat in Court without an oath having been administered to him.[1]

ARTICLE 124.

FORM OF OATHS; BY WHOM THEY MAY BE ADMINISTERED.

Oaths are binding which are administered in such form and with such ceremonies as the person sworn declares to be binding.[2]

Any person to whom an oath is administered, who so desires, may be sworn with uplifted hand in the form and manner usual in Scotland.[3]

Every person now or hereafter having power by law or by

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[1] *Hickman* v. *Berens*, [1895], 2 Ch. p. 638, following the previous unreported case of *Kempshall* v. *Holland* (but see 98 L. T. p. 489, Leading Article), decided in the Court of Appeal. In the former case the original proceedings took place before an official referee; in both the barrister's statement was in substitution for an affidavit. See Article 111, and Note XLII.

[2] 1 & 2 Vict. c. 105 and 1 & 2 Geo. 5, c. 6, s. 17. The oath is one taken as a juryman, or "on appointment to any office or employment, or on any occasion whatever," a curious enactment.

[3] 51 & 52 Vict. c. 46, s. 5.

consent of parties to hear, receive, and examine evidence, is empowered to administer an oath to all such witnesses as are lawfully called before him.[1]

ARTICLE 125.

HOW ORAL EVIDENCE MAY BE TAKEN.

Oral evidence may be taken[2] (according to the law relating to civil and criminal procedure)—

In open court upon a final or preliminary hearing·

Or out of court for future use in Court—

(*a*) upon affidavit,

(*b*) under a commission,[3]

(*c*) before any officer of the Court or any other person or persons appointed for that purpose by the Court or a judge under the Judicature Act, 1875, Order XXXVII., Rule 5.

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[1] 14 & 15 Vict. c. 99, s. 16.

[2] As to civil procedure, see Order XXXVII. to Judicature Act of 1875. As to criminal procedure, see 11 & 12 Vict. c. 42, for preliminary procedure, and the rest of this chapter for final hearings.

[3] The law as to commissions to take evidence is as follows: The root of it is 13 Geo. III. c. 53. Sect. 40 of this Act provides for the issue of a commission to the Supreme Court of Calcutta (which was first established by that Act) and the corresponding authorities at Madras and Bombay to take evidence in cases of charges of misdemeanour brought against Governors, &c., in India in the Court of King's Bench. Sect. 42 applies to parliamentary proceedings, and s. 44 to civil cases in India. These provisions have been extended to all the colonies by 1 Will. IV. c. 22, and so far as they relate to civil proceedings to the world at large. 3 & 4 Vict. c. 105, gives a similar power to the Courts at Dublin. See as to cases in which commissions will not be granted, *In re Boyce, Crofton* v. *Crofton*, 1882, 20 Ch. Div. 760; and *Berdan* v. *Greenwood*, 1880, ibid., in note, 764; also

Oral evidence taken upon a preliminary hearing may, in the cases specified in Articles 140-142, be recorded in the form of a deposition, which deposition may be used as documentary evidence of the matter stated therein in the cases and on the conditions specified in Chapter XVII.

Oral evidence taken in open court must be taken according to the rules contained in this chapter relating to the examination of witnesses.

[1] Oral evidence taken under a commission must be taken in the manner prescribed by the terms of the commission.

[2] Oral evidence taken under a commission must be taken in the same manner as if it were taken in open court; but the examiner has no right to decide on the validity of objections taken to particular questions, but must record the questions, the fact that they were objected to, and the answers given.

[3] If secondary evidence of the contents of any document is not objected to on the taking of a commission, it cannot be objected to afterwards.

[4] Oral evidence given on affidavit must be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief and the grounds thereof may be admitted. The costs of every affidavit unnecessarily setting forth matters of hearsay or argumentative matter, or copies of or extracts from documents, must be paid by the party filing them.

Langen v. *Tate*, 1883, 24 Ch. Div. 322; *Lawson* v. *Vacuum Brake Co.*, 1884; 27 Ch. Div. 137.

[1] Taylor, s. 513. [2] *Id.*, s. 512.

[3] *Robinson* v. *Davies*, 1879, 5 Q. B. D. 26.

[4] R. S. C., Order XXXVIII., 3

[1] When a deposition, or the return to a commission, or an affidavit, or evidence taken before an examiner, is used in any court as evidence of the matter stated therein, the party against whom it is read may object to the reading of anything therein contained on any ground on which he might have objected to its being stated by a witness examined in open court, provided that no one is entitled to object to the reading of any answer to any question asked by his own representative on the execution of a commission to take evidence.

ARTICLE 126.*

EXAMINATION IN CHIEF, CROSS-EXAMINATION, AND RE-EXAMINATION.

Witnesses examined in open court must be first examined in chief, then cross-examined, and then re-examined.

Whenever any witness has been examined in chief, or has been[2] intentionally sworn, or has made a promise and declaration as hereinbefore mentioned for the purpose of giving evidence, the[3] opposite party has a right to cross-examine him; but the opposite party is not entitled to cross-examine merely because a witness has been called to produce a document on a *subpœna duces tecum*, or in order to be identified.

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* See Note XLV.

[1] Taylor, s. 548. *Hutchinson* v. *Bernard*, 1836, 2 Moo. & Rob. 1.

[2] See Cases in Taylor, s. 1429.

[3] A person being tried on an indictment jointly with a witness giving evidence under the Criminal Evidence Act, 1898, may be an "opposite party," so as to have a right to cross-examine. *R.* v. *Hadwen*, [1902], 1 K. B. 882.

After the cross-examination is concluded, the party who called the witness has a right to re-examine him.

The Court may in all cases permit a witness to be recalled either for further examination in chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and further re-examination respectively.

If a witness dies, or becomes incapable of being further examined at any stage of his examination, the evidence given before he became incapable is good.[1]

If in the course of a trial a witness who was supposed to be competent appears to be incompetent, his evidence may be withdrawn from the jury, and the case may be left to their decision independently of it.[2]

ARTICLE 127.

TO WHAT MATTERS CROSS-EXAMINATION AND RE-EXAMINATION MUST BE DIRECTED.

The examination and cross-examination must relate to facts in issue or relevant or deemed to be relevant thereto, but the cross-examination need not be confined to the facts to which the witness testified on his examination in chief.

The re-examination must be directed to the explanation of matters referred to in cross-examination; and if new matter

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[1] *R.* v. *Doolin*, 1832, 1 Jebb, C. C. 123. The judges compared the case to that of a dying declaration, which is admitted though there can be no cross-examination.

[2] *R.* v. *Whitehead*, 1866, 1 C. C. R. 33.

is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

ARTICLE 128.

LEADING QUESTIONS.

Questions suggesting the answer which the person putting the question wishes or expects to receive, or suggesting disputed facts as to which the witness is to testify, must not, if objected to by the adverse party, be asked in examination in chief, or in re-examination, except with the permission of the Court, but such questions may be asked in cross-examination.

ARTICLE 129.*

QUESTIONS LAWFUL IN CROSS-EXAMINATION.

When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend—

(1) To test his accuracy, veracity, or credibility; or

(2) To shake his credit, by injuring his character,

Provided that a person charged with a criminal offence and being a witness under the Criminal Evidence Act, 1898, may be cross-examined to the effect, and under the circumstances, described in Article 56.

Witnesses have been compelled to answer such questions, though the matter suggested was irrelevant to the matter in issue, and though the answer was disgraceful to the witness; but it is submitted that the Court has the right to exercise a discretion in such cases, and to refuse to compel

* See Note XLVI.

such questions to be answered when the truth of the matter suggested would not in the opinion of the Court affect the credibility of the witness as to the matter to which he is required to testify.

In the case provided for in Article 120, a witness cannot be compelled to answer such a question.

Illustration.

(*a*) The question was, whether A committed perjury in swearing that he was R. T. B deposed that he made tattoo marks on the arm of R. T., which at the time of the trial were not and never had been on the arm of A. B was asked and was compelled to answer the question whether, many years after the alleged tattooing, and many years before the occasion on which he was examined, he committed adultery with the wife of one of his friends.[1]

ARTICLE 129A.

JUDGE'S DISCRETION AS TO CROSS-EXAMINATION TO CREDIT.

The judge may in all cases disallow any questions put in cross-examination of any party or other witness which may appear to him [*i.e.* the judge] to be vexatious and not relevant to any matter proper to be inquired into in the cause or matter.[2]

ARTICLE 130.

EXCLUSION OF EVIDENCE TO CONTRADICT ANSWERS TO QUESTIONS TESTING VERACITY.

When a witness under cross-examination has been asked and has answered any question which is relevant to the

[1] *R.* v. *Orton*, 1874. See summing-up of Cockburn, C.J., vol. ii. p. 719, &c.

[2] R. S. C., Order XXXVI., rule 38. I leave Article 129 as it originally stood; because this Order is after all only an exception to

inquiry only in so far as it tends to shake his credit by injuring his character, no evidence can be given to contradict him except in the following cases :—[1]

(1) If a witness is asked whether he has been previously convicted of any felony or misdemeanour, and denies or does not admit it, or refuses to answer, evidence may be given of his previous conviction thereof.[2]

(2) If a witness is asked any question tending to show that he is not impartial, and answers it by denying the facts suggested, he may be contradicted.[3]

ARTICLE 131.*

STATEMENTS INCONSISTENT WITH PRESENT TESTIMONY MAY BE PROVED.

Every witness under cross-examination in any proceeding, civil or criminal, may be asked whether he has made any former statement relative to the subject-matter of the proceeding and inconsistent with his present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion, and if he does not distinctly admit that he has made such a statement, proof may be given that he did in fact make it.

The same course may be taken with a witness upon his examination in chief, if the judge is of opinion that he is

* See Note XLVII.

the rule. "Him" must refer to the judge, as it would otherwise refer to the "party or other witness," which would be absurd.

[1] *A. G.* v. *Hitchcock*, 1847, 1 Ex. 91, pp. 99–105. See, too, *Palmer* v. *Trower*, 1852, 8 Ex. 247.

[2] 28 & 29 Vict. c. 18, s. 6; re-enacting 17 & 18 Vict. c. 125, s. 25, now repealed.

[3] *A. G.* v. *Hitchcock*, 1847, 1 Ex. 91, pp. 100, 105.

"adverse" [*i.e.* hostile] to the party by whom he was called and permits the question.

It seems that the discretion of the judge cannot be reviewed afterwards.[1]

ARTICLE 132.

CROSS-EXAMINATION AS TO PREVIOUS STATEMENTS IN WRITING.

A witness under cross-examination [or a witness whom the judge under the provisions of Article 131 has permitted to be examined by the party who called him as to previous statements inconsistent with his present testimony] may be questioned as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the indictment or proceeding, without such writing being shown to him [or being proved in the first instance]; but if it is intended to contradict him by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of contradicting him. The judge may, at any time during the trial, require the document to be produced for his inspection, and may thereupon make such use of it for the purposes of the trial as he thinks fit.[2]

ARTICLE 133.

IMPEACHING CREDIT OF WITNESS.

The credit of any witness may be impeached by the adverse party, by the evidence of persons who swear that

[1] *Rice* v *Howard*, 1886, Q. B. D. 681.

[2] 28 & 29 Vict. c. 18, s. 5, re-enacting 17 & 18 Vict. c. 125, s. 24, now repealed. I think the words between brackets represent the meaning

they, from their knowledge of the witness, believe him to be unworthy of credit upon his oath. Such persons may not upon their examination in chief, give reasons for their belief, but they may be asked their reasons in cross-examination, and their answers cannot be contradicted.[1]

No such evidence may be given by the party by whom any witness is called,[2] but, when such evidence is given by the adverse party, the party who called the witness may give evidence in reply to show that the witness is worthy of credit.[3]

ARTICLE 134.

OFFENCES AGAINST WOMEN.

When a man is prosecuted for rape or an attempt to ravish, it may be shown that the woman against whom the offence was committed was of a generally immoral character, although she is not cross-examined on the subject.[4] The woman may in such a case be asked whether she has had connection with other men, but her answer cannot be contradicted.[5] She may also be asked whether she has had connection on other occasions with the prisoner, and if she denies it she may be contradicted.[6]

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of the sections, but in terms they apply only to witnesses under cross-examination—"Witnesses may be cross-examined," &c.

[1] 2 Ph. Ev. 503-4; Taylor, 1470, 1470A. See *R.* v. *Brown*, 1867, 1 C. C. R. 70.

[2] 28 & 29 Vict. c. 18, s. 3.

[3] 2 Ph. Ev. 504.

[4] *R.* v. *Clarke*, 1817, 2 Star. 241.

[5] *R.* v. *Holmes*, 1871, 1 C. C. R. 334.

[6] *R.* v. *Martin*, 1834, 6 C. & P. 562, and remarks in *R.* v. *Holmes*, p. 337, per Kelly, C.B. See also *R.* v. *Cockroft*, 1870, 11 Cox 410; 41 L.J., M. C., 12, and *R.* v. *Riley*, 1887, 18 Q. B. D. 481.

ARTICLE 135.

WHAT MATTERS MAY BE PROVED IN REFERENCE TO DECLARATIONS RELEVANT UNDER ARTICLES 25–32.

Whenever any declaration or statement made by a deceased person relevant or deemed to be relevant under Articles 25–32, both inclusive, or any deposition is proved, all matters may be proved in order to contradict it, or in order to impeach or confirm the credit of the person by whom it was made which might have been proved if that person had been called as a witness, and had denied upon cross-examination the truth of the matter suggested.[1]

ARTICLE 136.

REFRESHING MEMORY.

A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the judge considers it likely that the transaction was at that time fresh in his memory.

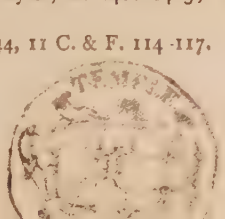
The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.[2]

An expert may refresh his memory by reference to professional treatises.[3]

[1] *R.* v. *Drummond*, 1784, 1 Lea. 337; *R.* v. *Pike*, 1829, 3 C. & P. 598. In these cases dying declarations were excluded, because the persons by whom they were made would have been incompetent as witnesses, but the principle would obviously apply to all the cases in question.

[2] 2 Ph. Ev. 480, &c.; Taylor, ss. 1406–1413; R. N. P. 176–7; Thipson, 469–473.

[3] *Sussex Peerage Case*, 1844, 11 C. & F. 114–117.



ARTICLE 137.

RIGHT OF ADVERSE PARTY AS TO WRITING USED TO REFRESH MEMORY.

Any writing referred to under Article 136 must be produced and shown to the adverse party if he requires it; and such party may, if he pleases, cross-examine the witness thereupon.[1]

ARTICLE 138.

GIVING, AS EVIDENCE, DOCUMENT CALLED FOR AND PRODUCED ON NOTICE.

When a party calls for a document which he has given the other party notice to produce, and such document is produced to and inspected by, the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so, and if it is or is deemed to be relevant.[2]

ARTICLE 139.

USING, AS EVIDENCE, A DOCUMENT PRODUCTION OF WHICH WAS REFUSED ON NOTICE.

When a party refuses to produce a document which he has had notice to produce, he may not afterwards use the document as evidence without the consent of the other party.[3]

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[1] See Cases in R. N. P. 176.

[2] *Wharam* v. *Routledge*, 1805, 5 Esp. 235; *Calvert* v. *Flower*, 1836, 7 C. & P. 386.

[3] *Doe* v. *Hodgson*, 1840, 12 A. & E. 135; but see remarks in 2 Ph. Ev. 270.

CHAPTER XVII.

OF DEPOSITIONS.

ARTICLE 140.

DEPOSITIONS BEFORE MAGISTRATES.

A DEPOSITION taken under 11 & 12 Vict. c. 42, s. 17, may be produced and given in evidence at the trial of the person against whom it was taken,

if it is proved [to the satisfaction of the judge] that the witness is dead, or so ill as not to be able to travel [although there may be a prospect of his recovery];[1]

[or, if he is kept out of the way by the person accused][2]

or, [probably if he is too mad to testify,][3] and

if the deposition purports to be signed by the justice by or before whom it purports to have been taken; and

if it is proved by the person who offers it as evidence that it was taken in the presence of the person accused, and that he, his counsel, or attorney, had a full opportunity of cross-examining the witness;

Unless it is proved that the deposition was not in fact signed by the justice by whom it purports to be signed

[or, that the statement was not taken upon oath;

[1] *R.* v. *Stephenson*, 1862, L. & C. 165.

[2] *R.* v. *Scaife*, 1851, 17 Q. B. 238. [3] Analogy of *R.* v. *Scaife*.

or [perhaps] that it was not read over to or signed by the witness].[1]

If there is a prospect of the recovery of a witness proved to be too ill to travel, the judge is not obliged to receive the deposition, but may postpone the trial.[2]

ARTICLE 141.

DEPOSITIONS UNDER 30 & 31 VICT. C. 35, S. 6.

A deposition taken for the perpetuation of testimony in criminal cases, under 30 & 31 Vict. c. 35, s. 6, may be produced and read as evidence, either for or against the accused, upon the trial of any offender or offence[3] to which it relates—

if the deponent is proved to be dead, or

if it is proved that there is no reasonable probability that the deponent will ever be able to travel or to give evidence, and

if the deposition purports to be signed by the justice by or before whom it purports to be taken, and

if it is proved to the satisfaction of the Court that reasonable notice in writing[4] of the intention to take such deposition was served upon the person (whether prosecutor or accused) against whom it was proposed to be read, and

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[1] I believe the above to be the effect of 11 & 12 Vict. c. 42, s. 17, as interpreted by the cases referred to, the effect of which is given by the words in brackets, also by common practice. Nothing can be more rambling or ill-arranged than the language of the section itself. See 2 Ph. Ev. 87–100; Taylor, ss. 479–482.

[2] *R.* v. *Tait*, 1861, 2 F. & F. 553.

[3] *Sic.*

[4] *R.* v. *Shurmer*, 1886, 17 Q. B. D. 323.

that such person or his counsel or attorney had or might have had, if he had chosen to be present, full opportunity of cross-examining the deponent.[1]

ARTICLE 141A.

DEPOSITIONS UNDER THE FOREIGN JURISDICTION ACT, 1890.

Where a person is charged with an offence cognizable by a British Court in a foreign country and is liable to be sent for trial to any British possession, he may, before being so sent for trial, tender for examination to the Court in the foreign country any competent witness whose evidence he deems material for his defence, and whom he alleges himself unable to produce at the trial in the British possession;

and the Court in the foreign country shall proceed in the examination and cross-examination of the witness as though he had been tendered at a trial before that Court, and shall cause the evidence so taken to be reduced into writing, and shall transmit to the Criminal Court of the British possession a copy thereof certified as correct under the seal of the Court before which it was taken, or the signature of the judge of that Court;

[1] 30 & 31 Vict. c. 35, s. 36. The section is very long, and as the first part of it belongs rather to the subject of criminal procedure than to the subject of evidence, I have omitted it. The language is slightly altered. I have not referred to depositions taken before a coroner (see 50 & 51 Vict. c. 71, s. 4), because the section says nothing about the conditions on which they may be given in evidence. The relevancy, therefore, depends on the common law principles expressed in Article 32. They must be signed by the coroner; but these are matters not of evidence, but of criminal procedure.

and thereupon the Court of the British possession before which the trial takes place shall allow so much of the evidence so taken as would have been admissible according to the law and practice of that Court, had the witness been produced and examined at the trial, to be read and received as legal evidence at the trial.[1]

ARTICLE 141B.

DEPOSITIONS OF CHILDREN.[2]

Where on the trial of any person on indictment for any offence of cruelty[3] or any of the offences mentioned in the First Schedule to the Children Act, 1908,[4] the Court is satisfied by the evidence of a registered medical practitioner that the attendance before the Court of any child in respect

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[1] 53 & 54 Vict. c. 37, s. 6.

[2] In this Article "child means a person under the age of fourteen years," and "young person" means a person who is fourteen years of age or upwards, and under the age of sixteen years (8 Edw. 7, c. 67, s. 131).

[3] 8 Edw. 7, c. 67, s. 29. An "offence of cruelty" is any offence defined in s. 12 (1), which is as follows:—"If any person over the age of sixteen years who has the custody, charge, or care of any child or young person, wilfully assaults, ill-treats, neglects, abandons, or exposes such child or young person, or causes or procures such child or young person to be assaulted, ill-treated, neglected, abandoned, or exposed in a manner likely to cause such child or young person unnecessary suffering, or injury to his health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement)," &c., &c.

[4] *i.e.* offences mentioned in the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), sect. 27 (exposing a child); sect. 55 (abducting a girl under sixteen); sect. 56 (stealing a child); and any offence against a child or young person under ss. 5 (manslaughter), 42 (assault), 43 (aggravated assault), 52 (indecent assault on a female), or 62 (attempt to commit sodomy, and indecent assault on a male); and any offence under the Dangerous Performances Acts, 1879, 1897; and any other offence involving bodily injury to a child or young person.

of whom the offence is alleged to have been committed would involve serious danger to its life or health, any deposition of the child taken under the Indictable Offences Act, 1848, and mentioned in Article 140, or under Part II. of the Children Act, 1908, is admissible in evidence either for or against the accused person without further proof thereof—

(*a*) if it purports to be signed by the justice by or before whom it purports to be taken; and

(*b*) if it is proved that reasonable notice of the intention to take the deposition has been served upon the person against whom it is proposed to use it as evidence, and that that person or his counsel or solicitor had, or might have had if he had chosen to be present, an opportunity of cross-examining the child or young person making the deposition.[1]

Where a justice is satisfied by the evidence of a duly qualified medical practitioner that the attendance before a Court of any child or young person in respect of whom an offence under Part II. of the Children Act, 1908,[2] or any of the offences mentioned in the First Schedule thereto,[3] is alleged to have been committed, would involve serious danger to his life or health, the justice may take in writing the deposition of the child or young person on oath, and shall thereupon subscribe the same, and add thereto a statement of his reason for taking the same, and of the day when and place where the same was taken, and of the names of the persons (if any) present at the taking thereof. The justice taking any such deposition shall transmit the

[1] 8 Edw. 7, c. 67, s. 29. [2] See Note 3, p. 156.
[3] See Note 4, p. 156.

same with his statement—(*a*) if the deposition relates to an offence for which any accused person is already committed for trial, to the proper officers of the Court, for trial at which the accused person has been committed; and (*b*) in any other case to the clerk of the peace of the county or borough in which the deposition has been taken.[1]

The deposition of the child referred to in this article need not be taken on oath in the case mentioned in Article 123A.

ARTICLE 142.

DEPOSITIONS UNDER MERCHANT SHIPPING ACT, 1894.

[2]Whenever, in the course of any legal proceedings instituted in any part of His Majesty's dominions before any judge or magistrate or before any person authorised by law or by consent of parties to receive evidence, the testimony of any witness is required in relation to the subject-matter of that proceeding, any deposition that such witness may have previously made on oath in relation to the same subject-matter before any justice or magistrate in His Majesty's dominions or any British consular officer elsewhere is admissible in evidence, subject to the following restrictions :—

1. If such proceeding is instituted in the United Kingdom or British possessions, due proof must be given that such witness cannot be found in that kingdom or possession respectively.

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[1] 8 Edw. 7, c. 67, s. 28.

[2] 57 & 58 Vict. c. 60, s. 691, applied to the Workmen's Compensation Act, 1906, 6 Edw. 7, c. 58, s. 7 (1) (c). There are some other cases in which depositions are admissible by statute, but they hardly belong to the Law of Evidence.

2. If such deposition was made in the United Kingdom, it is not admissible in any proceeding instituted in the United Kingdom.

3. If the deposition was made in any British possession, it is not admissible in any proceeding instituted in that British possession.

4. If the proceeding is criminal the deposition is not admissible unless it was made in the presence of the person accused.

A deposition so made must be authenticated by the signature of the judge, magistrate, or consular officer before whom it was made, and he must certify (if the fact is so) that the accused was present at the taking thereof.

It is not necessary in any case to prove the signature or the official character of the person appearing to have signed any such deposition; and in any criminal proceeding the certificate aforesaid is (unless the contrary is proved) sufficient evidence of the accused having been present in manner thereby certified.

Nothing in this article contained affects any provision by Parliament or by any local legislature as to the admissibility of depositions or the practice of any court according to which depositions not so authenticated are admissible as evidence.

CHAPTER XVIII.

OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE.

ARTICLE 143.

A NEW trial will not be granted in any civil action on the ground of the improper admission or rejection of evidence, unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial of the action.[1]

If in a criminal case evidence is improperly rejected or admitted, there is no remedy unless the prisoner is convicted.

An appeal on the ground of misreception or misrejection of evidence may be dismissed by the Court of Criminal Appeal if they consider that no substantial miscarriage of justice has actually occurred.[2]

A further appeal lies to the House of Lords from any decision of a point of law by the Court of Criminal Appeal, upon the certificate of the Attorney-General that such further appeal is desirable in the public interest.[3]

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[1] S. C. R., Order XXXIX., 6. [2] 7 Edw. 7, c. 23, s. 4 (1).
[3] *Ibid.*, s. 1 (6).

APPENDIX OF NOTES.

NOTE I.

(TO ARTICLE 1.—DEFINITION OF TERMS.)

THE definitions are simply explanations of the senses in which the words defined are used in this work. They will be found, however, if read in connection with my 'Introduction to the Indian Evidence Act,' to explain the manner in which it is arranged.

I use the word "presumption" in the sense of a presumption of law capable of being rebutted. A presumption of fact is simply an argument. A conclusive presumption I describe as conclusive proof. Hence the few presumptions of law which I have thought it necessary to notice are the only ones I have to deal with.

In earlier editions of this work I gave the following definition of "relevancy."

"Facts, whether in issue or not, are relevant to each other when one is, or probably may be, or probably may have been—

the cause of the other;

the effect of the other;

an effect of the same cause;

a cause of the same effect;

or when the one shows that the other must or cannot have occurred, or probably does or did exist, or not;

or that any fact does or did exist, or not, which in the common course of events would either have caused or have been caused by the other;

provided that such facts do not fall within the exclusive rules contained in Chapters III., IV., V., VI.; or that they do fall within, the exceptions to those rules contained in those chapters."

This was taken (with some verbal alterations) from a pamphlet called 'The Theory of Relevancy for the purpose of Judicial Evidence, by George Clifford Whitworth, Bombay Civil Service. Bombay, 1875.'

The 7th section of the Indian Evidence Act is as follows: "Facts which are the occasion, cause, or effect, immediate or otherwise, of relevant facts or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant."

The 11th section is as follows:—

"Facts not otherwise relevant are relevant;

"(1) If they are inconsistent with any fact in issue or relevant fact;

"(2) If by themselves, or in connection with other facts, they make the existence or non-existence of any fact in issue, or relevant fact, highly probable or improbable."

In my 'Introduction to the Indian Evidence Act,' I examined at length the theory of judicial evidence, and tried to show that the theory of relevancy is only a particular

case of the process of induction, and that it depends on the connection of events as cause and effect. This theory does not greatly differ from Bentham's, though he does not seem to me to have grasped it as distinctly as if he had lived to study Mill's Inductive Logic.

My theory was expressed too widely in certain parts, and not widely enough in others; and Mr. Whitworth's pamphlet appeared to me to have corrected and completed it in a judicious manner. I accordingly embodied his definition of relevancy, with some variations and additions, in the text of the first edition. The necessity of limiting in some such way the terms of the 11th section of the Indian Evidence Act may be inferred from a judgment by Mr. Justice West (of the High Court of Bombay), in the case of *R.* v. *Parbhudas and others*, printed in the 'Law Journal,' May 27, 1876. I have substituted the present definition for it, not because I think it wrong, but because I think it gives rather the principle on which the rule depends than a convenient practical rule.

As to the coincidence of this theory with English law, I can only say that it will be found to supply a key which will explain all that is said on the subject of circumstantial evidence by the writers who have treated of that subject. Mr. Whitworth goes through the evidence given against the German, Müller, executed for murdering Mr. Briggs on the North London Railway, and shows how each item of it can be referred to one or the other of the heads of relevancy which he discusses.

The theory of relevancy thus expressed would, I believe, suffice to solve every question which can arise upon the

subject; but the legal rules based upon an unconscious apprehension of the theory exceed it at some points and fall short of it at others.

NOTE II.

(TO ARTICLE 2.—RELEVANCE.)

See 1 Ph. Ev. 493, &c.; Best, ss. 111 and 251; Taylor Pt. II. Ch. II.; Phipson, 40–43.

For instances of relevant evidence held to be insufficient for the purpose for which it was tendered on the ground of remoteness, see *R.* v. ——, 1826, 2 C. & P. 459; and *Mann* v. *Lang*, 1835, 3 A. & E. 699.

Mr. Taylor (s. 949) adopts from Professor Greenleaf the statement that there is "evidence which the law excludes on public grounds, namely, that which involves the unnecessary disclosure of matter that is indecent or offensive to public morals, or injurious to the feelings of third persons." The authorities given for this are actions on wagers which the Court refused to try, or in which they arrested judgment, because the wagers were in themselves impertinent and offensive, as, for instance, a wager as to the sex of the Chevalier D'Eon (*Da Costa* v. *Jones*, 1778; Cowp. 729). No action now lies upon a wager, and I can find no authority for the proposition advanced by Professor Greenleaf. I know of no case in which a fact in issue or relevant to an issue which the Court is bound to try can be excluded merely because it would pain some one who is a stranger to the action. Indeed, in *Da Costa* v. *Jones*, Lord Mansfield said expressly: "Indecency of evidence is no objection to

its being received where it is necessary to the decision of a civil or criminal right" (p. 734). (See Article 129, and Note XLVI.)

NOTE III.

(To Article 4.—Acts of Conspirators.)

On this subject, see also 1 Ph. Ev. 157–164; Taylor, ss. 591–595; Best, s. 508; Russ. Cri., 191 *et seq.* (See, too, *The Queen's Case*, 1820, 2 Br. & Bing. 309–10.) Phipson, 92–4, 99–102.

The principle is substantially the same as that of principal and accessory, or principal and agent. When various persons conspire to commit an offence, each makes the rest his agents to carry the plan into execution. (See, too, Article 17, Note XI.)

NOTE IV.

(To Article 5.—Relevancy of Facts constituting Title.)

The principle is fully explained and illustrated in *Malcolmson* v. *O'Dea*, 1862, 10 H. L. C. 593. See particularly the reply to the questions put by the House of Lords to the Judges, delivered by Willes, J., 611–622.

See also 1 Ph. Ev. 234–239; Taylor, ss. 658–667; Best, s. 499.

Mr. Philips and Mr. Taylor treat this principle as an exception to the rule excluding hearsay. They regard the statements contained in the title-deeds as written statements made by persons not called as witnesses. I think the deeds must be regarded as constituting the transactions which

they effect; and in the case supposed in the text, those transactions are actually in issue. When it is asserted that land belongs to A, what is meant is, that A is entitled to it by a series of transactions of which his title-deeds are by law the exclusive evidence (see Article 90). The existence of the deeds is thus the very fact which is to be proved.

Mr. Best treats the case as one of "derivative evidence," an expression which does not appear to me felicitous.

NOTE V.

(TO ARTICLE 8.—STATEMENTS ACCOMPANYING ACTS, COMPLAINTS, &C.)

The items of evidence included in this article are often referred to by the phrase "res gestæ," which seems to have come into use on account of its convenient obscurity. The doctrine of "res gestæ" was much discussed in the case of *Doe* v. *Tatham*, 1837. In the course of the argument, Bosanquet, J., observed, "How do you translate res gestæ? gestæ, by whom?" Parke, B., afterwards observed, "The acts by whomsoever done are res gestæ, if relevant to the matter in issue. But the question is, what are relevant?" (7 A. & E. 355.) In delivering his opinion to the House of Lords, the same Judge laid down the rule thus: "Where any facts are proper evidence upon an issue [*i.e.* when they are in issue, or relevant to the issue] all oral or written declarations which can explain such facts may be received in evidence." (Same Case, 4 Bing. N. C. 548.) The question asked by Baron Parke goes to the root of the whole

subject, and I have tried to answer it at length in the text, and to give it the prominence in the statement of the law which its importance deserves.

Besides the cases cited in the illustrations, see cases as to statements accompanying acts collected in 1 Ph. Ev. 152–57; Taylor, ss. 583–91; and Phipson, 255–62. I have stated, in accordance with *R.* v. *Walker*, 1839, 2 M. & R. 212, that the particulars of a complaint are not admissible; but I have heard Willes, J., rule that they were on several occasions, vouching Parke, B., as his authority. *R.* v. *Walker* was decided by Parke, B., in 1839. Though he excluded the statement, he said, "The sense of the thing certainly is, that the jury should in the first instance know the nature of the complaint made by the prosecutrix, and all that she then said. But for reasons which I never could understand, the usage has obtained that the prosecutrix's counsel should only inquire generally whether a complaint was made by the prosecutrix of the prisoner's conduct towards her, leaving the prisoner's counsel to bring before the jury the particulars of that complaint by cross-examination."

Lord Bramwell was in the habit, during the latter part of his judicial career, of admitting the complaint itself, and other judges have sometimes done the same. The practice is certainly in accordance with common sense.

The author's note is here left as he wrote it. His own practice on the Bench was the same as that which he ascribes to Willes, J., Parke, B., and Lord Bramwell, and the same course, of admitting the terms of the complaint as part of the evidence for the prosecution, was habitually

followed by the late Sir A. L. Smith, M.R., and the late Mr. Justice Cave, as long as they were Judges of the Queen's Bench Division. It is now generally accepted as law, in so far as concerns rape and similar offences, by reason of the practical effect given to two cases, of which the earlier is *R.* v. *Lillyman*, [1896], 2 Q. B. 167.

The count upon which Lillyman was substantially tried, and upon which alone (*ib.* at p. 170) he was convicted, charged that he unlawfully attempted to have carnal knowledge of a girl under sixteen and over thirteen. The question of her consent was therefore immaterial (Criminal Law Amendment Act, 1885, s. 5, by which the offence was created). In giving her evidence, however, the girl asserted that she did not consent to the attempt. Sir Henry Hawkins admitted evidence of the terms of a complaint made by the girl to her mistress, in the absence of the prisoner, very shortly after the commission of the acts charged. The prisoner was convicted, and the case was reserved on the question whether this evidence was admissible. The Court (Lord Russell, C.J., Pollock, B., Hawkins, Cave, and Wills, JJ.) affirmed the conviction. The ground of the decision is clearly stated in two passages of the judgment of the Court, delivered by Sir Henry Hawkins. "It [the complaint] is clearly not admissible as evidence of the facts complained of. . . . The complaint can only be used as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as being inconsistent with her consent to that of which she complains" (*ib.* at p. 170). "The evidence is admissible only upon the ground that it was a complaint of that which is charged

against the prisoner, and can be legitimately used only for the purpose of enabling the jury to judge for themselves whether the conduct of the woman was consistent with her testimony on oath given in the witness-box negativing her consent, and affirming that the acts complained of were against her will, and in accordance with the conduct they would expect in a truthful woman under the circumstances detailed by her" (*ib.* at p. 177). In other words, the judgment decides that where a woman has made a statement as to her own consent, which in the case before the Court happened to be perfectly irrelevant, the details of her complaint may be admitted only because they may serve as a test of the credibility which ought to attach to the relevant parts of her testimony.

This curious qualification of the admissibility of the terms of the complaint was generally ignored in practice between 1897 and 1905, and in the latter year was to a considerable extent explained away by the judgment (delivered by Ridley, J.) of the Court for Crown Cases Reserved (Lord Alverstone, C.J., Kennedy, Ridley, Channell, and Phillimore, JJ.) in *R.* v. *Osborne*, [1905], 1 K. B. 551. In this case the charge was one of indecent assault, with a second count for common assault, and the prosecutrix was under thirteen, so that on the first count, upon which in substance Osborne was tried, her consent was immaterial. The judgment points out that the reasoning of the judgment in *R.* v. *Lillyman* applies "equally to other parts of the story," besides the allegation of want of consent. Unless this were so, "it seems illogical to allow" the evidence held in Lillyman's case

to have been rightly admitted. "In accordance with principle such complaints are admissible, not merely as negativing consent, but because they are consistent with the story of the prosecutrix."

The judgment of the Court expressly declares that the question of the admissibility of the terms of the complaint was not raised by the case as stated. It is difficult to understand how the admissibility of evidence of the complaint, apart from the terms of it, can ever have been questioned; and it is certain that evidence of the terms of the complaint was in fact admitted. The general rule for criminal cases is thus stated:—"In all ordinary cases, indeed, the principle must be observed which rejects statements made by any one in the prisoner's absence. Charges of this kind form an exceptional class, and in them such statements ought, under proper safeguards, to be admitted." The exceptional treatment of rape, etc., in this respect is recognized by Hale (P. C., I, 663) and all the older authorities.

This decision has been treated as giving authoritative confirmation to the practice whereby, in all cases of rape and similar offences, evidence of the making of complaints, and of the terms in which they were made, is held generally to be admissible, if the complaints were made reasonably soon after the alleged offence, and not "elicited" by leading questions.

NOTE VI.

(TO ARTICLES 10, 11, 12.—RELEVANCE OF SIMILAR FACTS, SYSTEM, &C.)

Article 10 is equivalent to the maxim, "Res inter alios acta alteri nocere non debet," which is explained and commented on in Best, ss. 506–510 (though I should scarcely adopt his explanation of it), and by Broom ('Maxims,' 8th ed., 748–761). The application of the maxim to the Law of Evidence is obscure, because it does not show how unconnected transactions should be supposed to be relevant to each other. The meaning of the rule must be inferred from the exceptions to it stated in Articles 11 and 12, which show that it means, You are not to draw inferences from one transaction to another which is not specifically connected with it merely because the two resemble each other. They must be linked together by the chain of cause and effect in some assignable way before you can draw your inference.

In its literal sense the maxim also fails, because it is not true that a man cannot be affected by transactions to which he is not a party. Illustrations to the contrary are obvious and innumerable; bankruptcy, marriage, indeed every transaction of life, would supply them.

The exceptions to the rule given in Articles 11 and 12 are generalised from the cases referred to in the Illustrations. It is important to observe that though the rule is expressed shortly, and is sparingly illustrated, it is of very much greater importance and more frequent application

than the exceptions. It is indeed one of the most characteristic and distinctive parts of the English Law of Evidence, for this is the rule which prevents a man charged with a particular offence from having either to submit to imputations which in many cases would be fatal to him, or else to defend every action of his whole life in order to explain his conduct on the particular occasion. A statement of the Law of Evidence which did not give due prominence to the four great exclusive rules of evidence of which this is one, would neither represent the existing law fairly nor in my judgment improve it.

The exceptions to the rule apply more frequently to criminal than to civil proceedings, and in criminal cases the Courts are always disinclined to run the risk of prejudicing the prisoner by permitting matters to be proved which tend to show in general that he is a bad man, and so likely to commit a crime.

Since the author wrote this note the "disinclination" mentioned above, though continuously asserted, has steadily become less effectual. Practically all the cases on this subject are enumerated and considered in *R.* v. *Armstrong*, [1922], 2 K. B. 193. The judgment in this case, adopting words previously used by Lord Sumner (*Thompson's Case*, [1913], A. C. 236), explains that the question involved "raises no new principle of law [and] elucidates no new aspect of familiar principles. It is a mere question of the application of the rules of evidence to this particular case."

NOTE VII.

(TO ARTICLE 13.—COURSE OF BUSINESS.)

As to presumptions arising from the course of office or business, see Best, s. 403; 1 Ph. Ev. 480–4; Taylor, ss. 176–82. The presumption, "Omnia esse rite acta," also applies. See Broom's 'Maxims' (8th ed. 737); Best, ss. 353–65; Taylor, s. 143, &c.; 1 Ph. Ev. 480; and Star. 757, 763.

NOTE VIII.

(TO ARTICLE 14.—HEARSAY.)

The unsatisfactory character of the definitions usually given as hearsay is well known. See Best, s. 495; Taylor, ss. 567–70.[1] The definition given by Mr. Philips sufficiently exemplifies it: "When a witness, in the course of stating what has come under the cognizance of his own senses concerning a matter in dispute, *states the language of*

[1] See, too, Phipson, pp. 218–224; particularly at pp. 221–2, where Sir James Stephen's account of the objection to hearsay as evidence is criticised on the ground that it ignores the possibility of the relevancy of the fact which hearsay alleges to have been stated, and that the objection to its being stated by a non-witness ought to be considered under the head of proof in answer to the question how relevant facts may be proved. The answer is that the leading feature of hearsay is that it proves a statement by a non-witness, which, taken alone, does not come within the definition of "relevant," and that it is therefore better treated of when considering the question, What may be proved? than in dealing with the subsequent question, How may a relevant fact be proved? The practical advantage of the author's method of treatment is that he separates admissions and confessions which owe their force to the circumstances under which they are made, from public and other formal documents which for purposes of convenience are made evidence by the operation of the law.

others which he has heard, or produces papers which he identifies as being written by particular individuals, he offers what is called hearsay evidence. This evidence may sometimes be the very matter in dispute," &c. (1 Ph. Ev. 143). If this definition is correct, the maxim, "Hearsay is no evidence," can only be saved from the charge of falsehood by exceptions which make nonsense of it. By attaching to it the meaning given in the text, it becomes both intelligible and true. There is no real difference between the fact that a man was heard to say this or that, and any other fact. Words spoken may convey a threat, supply the motive for a crime, constitute a contract, amount to slander, &c., &c.; and if relevant or in issue, on these or other grounds, they must be proved, like other facts, by the oath of some one who heard them. The important point to remember about them is that bare assertion must not, generally speaking, be regarded as relevant to the truth of the matter asserted.

The doctrine of hearsay evidence was fully discussed by many of the judges in the case of *Doe* d. *Wright* v. *Tatham*, 1837, on the different occasions when that case came before the Court (see 7 A. & E. 313–408; 4 Bing. N. C. 489–573). The question was whether letters addressed to a deceased testator, implying that the writers thought him sane, but not acted upon by him, could be regarded as relevant to his sanity, which was the point in issue. The case sets the stringency of the rule against hearsay in a light which is forcibly illustrated by a passage in the judgment of Baron Parke (7 A. & E. 385–8), to the following effect:—He treats the letters as "statements of the writers, not on oath, of the truth of the matter in question, with

this in addition, that they had acted upon the statements on the faith of their being true by their sending the letters to the testator." He then goes through a variety of illustrations which had been suggested in argument, and shows that in no case ought such statements to be regarded as relevant to the truth of the matter stated, even when the circumstances were such as to give the strongest possible guarantee that such statements expressed the honest opinions of the persons who made them. Amongst others he mentions the following :—"The conduct of the family or relations of a testator taking the same precautions in his absence as if he were a lunatic—his election in his absence to some high and responsible office; the conduct of a physician who permitted a will to be executed by a sick testator; the conduct of a deceased captain on a question of seaworthiness, who, after examining every part of a vessel, embarked in it with his family; all these, when deliberately considered, are, with reference to the matter in issue in each case, mere instances of hearsay evidence—mere statements, not on oath, but applied in or vouched by the actual conduct of persons by whose acts the litigant parties are not to be bound." All these matters are therefore to be treated as irrelevant to the questions at issue.

These observations make the rule quite distinct, but the reason suggested for it in the concluding words of the passage extracted appears to be weak. That passage implies that hearsay is excluded because no one "ought to be bound by the act of a stranger." That no one shall have power to make a contract for another or commit a crime

for which that other is to be responsible without his authority is obviously reasonable, but it is not so plain why A's conduct should not furnish good grounds for inference as to B's conduct, though it was not authorised by B. The importance of shortening proceedings, the importance of compelling people to procure the best evidence they can, and the importance of excluding opportunities of fraud, are considerations which probably justify the rule excluding hearsay; but Baron Parke's illustrations of its operation clearly prove that in some cases it excluded the proof of matter which, but for it, would be regarded not only as relevant to particular facts, but as good grounds for believing in their existence.

NOTE IX.

(TO ARTICLE 15.—ADMISSIONS DEFINED.)

This definition is intended to exclude admissions by pleading, admissions which, if so pleaded, amount to estoppels, and admissions made for the purposes of a cause by the parties or their solicitors. These subjects are usually treated of by writers on evidence; but they appear to me to belong to other departments of the law. The subject, including the matter which I omit, is treated at length in 1 Ph. Ev. 308–401; Taylor, ss. 723–861; and Phipson, 227–254. A vast variety of cases upon admissions of every sort may be found by referring to Roscoe, N. P. (Index, under the word *Admissions*.) It may perhaps be well to observe that when an admission is contained in a document, or series of documents, or when it forms part of a discourse or conversation, so much and no more of the document, series of documents,

discourse or conversation, must be proved as is necessary for the full understanding of the admission, but the judge or jury may of course attach degrees of credit to different parts of the matter proved. This rule is elaborately discussed and illustrated by Mr. Taylor, ss. 725–38. It has lost much of the importance which attached to it when parties to actions could not be witnesses, but could be compelled to make admissions by bills of discovery. The ingenuity of equity draughtsmen was under that system greatly exercised in drawing answers in such form that it was impossible to read part of them without reading the whole, and the ingenuity of the Court was at least as much exercised in countermining their ingenious devices. The power of administering interrogatories, and of examining the parties directly, has made great changes in these matters.

NOTE X.

(To Article 16.—Admissions, by whom made.)

As to admissions by parties, see *Moriarty* v. *L. C. & D. Railway*, 1870, L. R. 5 Q. B. 320, per Blackburn, J.; *Alner* v. *George*, 1808, 1 Camp. 392; *Bauerman* v. *Radenius*, 1798, 7 T. R. 663.

As to admissions by parties interested, see *Spargo* v. *Brown*, 1829, 9 B. & C. 935.

See also on the subject of this article, 1 Ph. Ev. 362–3, 369, 398; Taylor, ss. 740–3, 755–7, 794; Roscoe, N. P. 67 *et seq.*; and Phipson, 228–254.

As to admissions by privies, see 1 Ph. Ev. 394–7, and Taylor (from Greenleaf), s. 787.

NOTE XI.

(TO ARTICLE 17.—ADMISSIONS BY AGENTS.)

The subject of the relevancy of admissions by agents is rendered difficult by the vast variety of forms which agency assumes, and by the distinction between an agent for the purpose of making a statement and an agent for the purpose of transacting business. If A sends a message by B, B's words in delivering it are in effect A's; but B's statements in relation to the subject-matter of the message have, as such, no special value. A's own statements are valuable if they suggest an inference which he afterwards contests because they are against his interest; but when the agent's duty is done, he has no special interest in the matter.

The principle as to admissions by agents is stated and explained by Sir W. Grant in *Fairlie* v. *Hastings*, 1804, 10 Ve. 126–7.

NOTE XII.

(TO ARTICLE 18.—ADMISSIONS BY STRANGERS.)

See, for a third exception (which could hardly occur now), *Clay* v. *Langslow*, 1827, M. & M. 45.

NOTE XIII.

(TO ARTICLE 19.—ADMISSIONS BY PARTY REFERRED TO.)

This comes very near to the case of arbitration. See, as to irregular arbitrations of this kind, 1 Ph. Ev. 383; Taylor, ss. 760–3; Phipson, 252–3.

NOTE XIV.

(TO ARTICLE 20.—ADMISSIONS WITHOUT PREJUDICE.)

See more on this subject in 1 Ph. Ev. 326–8; Taylor, ss. 774, 795; Roscoe, N. P. 62; Phipson, 231–2.

NOTE XV.

(TO ARTICLE 22.—CONFESSIONS UNDER THREAT.)

On the law as to Confessions, see 1 Ph. Ev. 401–23; Taylor, ss. 872–84, and s. 902; Best, ss. 551–74; Roscoe, Cr. Ev. 37–53; Russ. Cri. 2155–87; Phipson, 263–275. Joy on Confessions reduces the law on the subject to the shape of 13 propositions, the effect of all of which is given in the text in a different form.

Many cases have been decided as to the language which amounts to an inducement to confess (see Roscoe, Cr. Ev. 39–41; and Phipson, 270–275, where most of them are collected). They are, however, for practical purposes, summed up in *R.* v. *Baldry*, 1852, 2 Den. 430, which is the authority for the last lines of the first paragraph of this article.

NOTE XVI.

(TO ARTICLE 23.—CONFESSIONS ON OATH.)

Cases are sometimes cited to show that if a person is examined as a witness on oath, his deposition cannot be used in evidence against him afterwards (see Taylor, ss. 886 and 895; also Russ. Cri. 2187, &c.). All these cases, however, relate to the examinations before magistrates of persons accused of crimes, under the statutes which

were in force before 11 & 12 Vict. c. 42, and which, like that statute, authorised statements by prisoners, but not their examination on oath.

Since the decisions in *R.* v. *Scott*, 1856, 1 D. & B. 47; 25 L. J., M. C. 128, and *R.* v. *Erdheim*, [1896], 2 Q. B. 260, decided on the Bankruptcy Acts of 1845 and 1883, it seems that these cases must be considered obsolete; see particularly the judgment of Russell, L.C.J., in the latter case, at pp. 267–8. The point is of considerable importance since the passing of the Criminal Evidence Act, 1898.

NOTE XVII.

(TO ARTICLE 26.—DYING DECLARATIONS.)

As to dying declarations, see 1 Ph. Ev. 239–52; Taylor, ss. 714–22; Best, s. 505; Starkie, 32 & 38; Russ. Cri. 2084–94; Roscoe, Crim. Ev. 31–36; Phipson, 318–323; *R.* v. *Baker*, 2 Mo. & Ro., 1837, 53, is a curious case on this subject. A and B were both poisoned by eating the same cake. C was tried for poisoning A. B's dying declaration that she made the cake in C's presence, and put nothing bad in it, was admitted as against C, on the ground that the whole formed one transaction.

NOTE XVIII.

(TO ARTICLE 27.—DECLARATIONS IN COURSE OF BUSINESS.)

1 Ph. Ev. 280–300; Taylor, ss. 697–712; Best, 501; R. N. P. 59–60; Phipson, 287–293; and see note to *Price* v. *Lord Torrington*, 1704, 2 S. L. C. 294. The last case on the subject is *Massey* v. *Allen*, 1879, 13 Ch. Div. 558.

NOTE XIX.

(TO ARTICLE 28.—DECLARATIONS AGAINST INTEREST.)

The best statement of the law upon this subject will be found in *Higham* v. *Ridgway*, and the note thereto, 2 S. L. C.

301. See also 1 Ph. Ev. 253–80; Taylor, ss. 668–96A; Best, s. 500; R. N. P. 54–59; Phipson, 278–286. See *Lloyd* v. *Powell Duffryn Coal Co.*, [1913] 2 Q. B. 130, and [1914] A. C. 733, where it was held in the Court of Appeal that a promise to marry and an admission of paternity were not against interest, and the subject was generally discussed. The decision was reversed by the House of Lords, but from a different point of view. See the note to p. 44.

A class of cases exists which I have not put into the form of an article, partly because their occurrence since the commutation of tithes must be very rare, and partly because I find a great difficulty in understanding the place which the rule established by them ought to occupy in a systematic statement of the law. They are cases which lay down the rule that statements as to the receipts of tithes and moduses made by deceased rectors and other ecclesiastical corporations sole are admissible in favour of their successors. There is no doubt as to the rule (see, in particular, *Short* v. *Lee*, 1821, 2 Jac. & Wal. 464; and *Young* v. *Clare Hall*, 1851, 17 Q. B. 529). The difficulty is to see why it was ever regarded as an exception. It falls directly within the principle stated in the text, and would appear to be an obvious illustration of it; but in many cases it has been declared to be anomalous, inasmuch as it enables a predecessor in title to make evidence in favour of his successor. This suggests that Article 28 ought to be limited by a proviso that a declaration against interest is not relevant if it was made by a predecessor in title of the person who seeks to prove it, unless it is a declaration by an ecclesiastical corporation sole, or a member of an ecclesiastical corporation aggregate (see *Short* v. *Lee*), as to the receipt of a tithe or modus.

Some countenance for such a proviso may be found in the terms in which Bayley, J., states the rule in *Gleadow* v. *Atkin* (*ante*, p. 37), and in the circumstance that when it first obtained currency the parties to an action were not competent witnesses. But the rule as to the indorsement of notes, bonds, &c., is distinctly opposed to such a view.

NOTE XX.

(TO ARTICLE 30.—DECLARATIONS AS TO PUBLIC AND GENERAL RIGHTS.)

Upon this subject, besides the authorities in the text, see 1 Ph. Ev. 169–97; Taylor, ss. 607–34; Best, s. 497; R. N. P. 48–51; Phipson, 294–306.

A great number of cases have been decided as to the particular documents, &c., which fall within the rule given in the text. They are collected in the works referred to above, but they appear to me merely to illustrate one or other of the branches of the rule, and not to extend or vary it. An award, *e.g.* is not within the last branch of illustration (*b*), because it "is but the opinion of the arbitrator, not upon his own knowledge" (*Evans* v. *Rees*, 1839, 10 A. & E. 155); but the detailed application of such a rule as this is better learnt by experience, applied to a firm grasp of principle, than by an attempt to recollect innumerable cases.

The case of *Weeks* v. *Sparke* (*ante*, p. 41) is remarkable for the light it throws on the history of the Law of Evidence. It was decided in 1813, and contains *inter alia* the following curious remarks by Lord Ellenborough: "It is stated to be the habit and practice of different circuits to admit this

species of evidence upon such a question as the present. That certainly cannot make the law, but it shows at least, from the established practice of a large branch of the profession, and of the judges who have presided at various times on those circuits, what has been the prevailing opinion upon this subject amongst so large a class of persons interested in the due administration of the law. It is stated to have been the practice both of the Northern and Western Circuits. My learned predecessor, Lord Kenyon, certainly held a different opinion, the practice of the Oxford Circuit, of which he was a member, being different." So in the *Berkeley Peerage Case*, 1811, Lord Eldon said, "When it was proposed to read this deposition as a declaration, the Attorney-General (Sir Vicary Gibbs) flatly objected to it. *He spoke quite right as a Western Circuiteer*, of what he had often heard laid down in the West, and never heard doubted" (4 Cam. 20). This shows how very modern much of the Law of Evidence is. Le Blanc, J., in *Weeks* v. *Sparke*, says, that a foundation must be laid for evidence of this sort "by acts of enjoyment within living memory." This seems superfluous, as no jury would ever find that a public right of way existed, which had not been used in living memory, on the strength of a report that some deceased person had said that there once was such a right.

NOTE XXI.

(To Article 31.—Declarations as to Pedigree.)

See 1 Ph. Ev. 197–233; Taylor, ss. 635–57; R. N. P. 44–48; Phipson, 307–17.

The *Berkeley Peerage Case*, 1811 (Answers of the Judges to the House of Lords), 4 Cam. 401, which established the third condition given in the text; and *Davies* v. *Lowndes*, 1843, 6 M. & G. 471 (see more particularly pp. 525–9, in which the question of family pedigrees is fully discussed), are specially important on this subject.

As to declarations as to the place of birth, &c., see *Shields* v. *Boucher*, 1847, 1 De G. & S. 49–58.

NOTE XXII.

(TO ARTICLE 32.—EVIDENCE IN FORMER PROCEEDINGS.)

See also 1 Ph. Ev. 306–8; Taylor, ss. 464–79A; Buller, N. P. 238, and following; Phipson, 436–440.

In reference to this subject it has been asked whether this principle applies indiscriminately to all kinds of evidence in all cases. Suppose a man were to be tried twice upon the same facts—*e.g.* for robbery after an acquittal for murder, and suppose that in the interval between the two trials an important witness who had not been called before the magistrates were to die, might his evidence be read on the second trial from a reporter's short-hand notes? This case might easily have occurred if Orton had been put on his trial for forgery as well as for perjury. I should be disposed to think on principle that such evidence would be admissible, though I cannot cite any authority on the subject. The common law principle on which depositions taken before magistrates and in Chancery proceedings were admitted seems to cover the case.

NOTE XXIII.

(TO ARTICLES 39–47.—JUDGMENTS AS EVIDENCE.)

The law relating to the relevancy of judgments of Courts of Justice to the existence of the matters which they assert is made to appear extremely complicated by the manner in which it is usually dealt with. The method commonly employed is to mix up the question of the effect of judgments of various kinds with that of their admissibility, subjects which appear to belong to different branches of the law.

Thus the subject, as commonly treated, introduces into the Law of Evidence an attempt to distinguish between judgments *in rem*, and judgments *in personam* or *inter partes* (terms adapted from, but not belonging to, Roman Law, and never clearly defined in reference to our own or any other system); also the question of the effect of the pleas of *autrefois acquit*, and *autrefois convict*, which clearly belong not to evidence, but to criminal procedure; the question of estoppels, which belongs rather to the law of pleading than to that of evidence; and the question of the effect given to the judgments of foreign Courts of Justice, which would seem more properly to belong to private international law. These and other matters are treated of at great length in 2 Ph. Ev. 1–78, and Taylor, ss. 1667–1723; in the note to the *Duchess of Kingston's Case*, 1776, 2 S. L. C. 765; and Phipson, 404–430. Best (ss. 588–595) treats the matter more concisely.

The text is confined to as complete a statement as I could make of the principles which regulate the relevancy of judgments considered as declarations proving the facts

which they assert, whatever may be the effect or the use to be made of those facts when proved. Thus the leading principle stated in Article 40 is equally true of all judgments alike. Every judgment, whether it be *in rem* or *inter partes*, must and does prove what it actually effects, though the effects of different sorts of judgments differ as widely as the effects of different sorts of deeds.

There has been much controversy as to the extent to which effect ought to be given to the judgments of foreign Courts in this country, and as to the cases in which the Courts will refuse to act upon them; but as a mere question of evidence, they do not differ from English judgments. The cases on foreign judgments are collected in the note to the *Duchess of Kingston's Case*, 2 S. L. C. 813–856. There is a convenient list of the cases in R. N. P. 208–9. The cases of *Goddard* v. *Gray*, 1870, L. R. 6 Q. B. 139; *Castrique* v. *Imrie*, 1870, L. R. 4 E. & I. A. 414; and *Nouvion* v. *Freeman*, [1889], 15 A. C. 1, are the latest leading cases on the subject.

NOTE XXIV.

(TO CHAPTER V.—OPINIONS, WHEN RELEVANT.)

On evidence of opinions, see 1 Ph. Ev. 520–8; Taylor, ss. 1416–25; Best, ss. 511–17; R. N. P. 175–6; Phipson, 382–403. The leading case on the subject is *Doe* v. *Tatham*, 1837, 7 A. & E. 313; and 4 Bing. N. C. 489, referred to above in Note VIII. Baron Parke, in the extracts there given, treats an expression of opinion as hearsay, that is, as a statement affirming the truth of the subject-matter of the opinion.

NOTE XXV.

(To CHAPTER VI.—CHARACTER, WHEN RELEVANT.)

See 1 Ph. Ev. 502–8; Taylor, ss. 349–63; Best, ss. 257–63; Russ. Cri. 2116–20: Phipson, 184–192. The subject is considered at length in *R.* v. *Rowton*, 1865, 1 L. & C. 520. One consequence of the view of the subject taken in that case is that a witness may with perfect truth swear that a man, who to his knowledge has been a receiver of stolen goods for years, has an excellent character for honesty, if he has had the good luck to conceal his crimes from his neighbours. It is the essence of successful hypocrisy to combine a good reputation with a bad disposition, and according to *R.* v. *Rowton*, the reputation is the important matter. The case is seldom if ever acted on in practice. The question always put to a witness to character is, What is the prisoner's character for honesty, morality, or humanity? as the case may be; nor is the witness ever warned that he is to confine his evidence to the prisoner's reputation. It would be no easy matter to make the common run of witnesses understand the distinction.

By the operation of the Criminal Evidence Act, 1898, the previous convictions, or bad character, of prisoners become relevant in a large proportion of the cases in which they give evidence.

NOTE XXVI.

(To ARTICLE 58.—JUDICIAL NOTICE.)

The list of matters judicially noticed in this article is not intended to be quite complete. It is compiled from 1 Ph

Ev. 458–67, and Taylor, ss. 4–21, where the subject is gone into more minutely. A convenient list is also given in R. N. P. 79–84, which is much to the same effect; see, too, Phipson, 18–26. It may be doubted whether an absolutely complete list could be formed, as it is practically impossible to enumerate everything which is so notorious in itself, or so distinctly recorded by public authority, that it would be superfluous to prove it. Paragraph (1) is drawn with reference to the fusion of Law, Equity, Admiralty, and Testamentary Jurisdiction effected by the Judicature Act.

NOTE XXVII.

(To ARTICLE 62.—ORAL EVIDENCE MUST BE DIRECT.)

Owing to the ambiguity of the word "evidence," which is sometimes used to signify the effect of a fact when proved, and sometimes to signify the testimony by which a fact is proved, the expression "hearsay is no evidence" has many meanings. Its common and most important meaning is the one given in Article 14, which might be otherwise expressed by saying that the connection between events, and reports that they have happened, is generally so remote that it is expedient to regard the existence of the reports as irrelevant to the occurrence of the events, except in excepted cases. Article 62 expresses the same thing from a different point of view, and is subject to no exceptions whatever. It asserts that whatever may be the relation of a fact to be proved to the fact in issue, it must, if proved by oral evidence, be proved by direct evidence. For instance, if it were to be proved under Article 31 that A, who died fifty

years ago, said that he had heard from his father B, who died 100 years ago, that A's grandfather C had told B that D, C's elder brother, died without issue, A's statement must be proved by some one who, with own ears, heard him make it. If (as in the case of verbal slander) the speaking of the words was the very point in issue, they must be proved in precisely the same way. Cases in which evidence is given of character and general opinion may perhaps seem to be exceptions to this rule, but they are not so. When a man swears that another has a good character, he means that he has heard many people, though he does not particularly recollect what people, speak well of him, though he does not recollect all that they said.

NOTE XXVIII.

(TO ARTICLES 66 & 67.—PROOF OF EXECUTION OF DOCUMENT MUST BE ATTESTED.)

This is probably the most ancient, and is, as far as it extends, the most inflexible of all the rules of evidence. The following characteristic observations by Lord Ellenborough occur in *R.* v. *Harringworth*, 1815, 4 M. & S. at p. 353:—

"The rule, therefore, is universal that you must first call the subscribing witness; and it is not to be varied in each particular case by trying whether, in its application, it may not be productive of some inconvenience, for then there would be no such thing as a general rule. *A lawyer who is well stored with these rules would be no better than any other man that is without them*, if by mere force of speculative reasoning it might be shown that the application of such

and such a rule would be productive of such and such an inconvenience, and therefore ought not to prevail; but if any general rule ought to prevail, this is certainly one that is as fixed, formal, and universal as any that can be stated in a Court of Justice."

In *Whyman* v. *Garth*, 1853, 8 Ex. at p. 807, Pollock, C.B., said, "The parties are supposed to have agreed *inter se* that the deed shall not be given in evidence without his [the attesting witness] being called to depose to the circumstances attending its execution."

In very ancient times, when the jury were witnesses as to matter of fact, the attesting witnesses to deeds (if a deed came in question) would seem to have been summoned with, and to have acted as a sort of accessors to, the jury. See as to this, Bracton, fo. 38*a*; Fortescue, *De Laudibus*, ch. xxxii. with Selden's note; and cases collected from the Year-books in Brooke's Abridgement, tit. *Testmoignes*.

For the present rule, and the exceptions to it, see 2 Ph. Ev. 242–61; Taylor, ss. 1839–44; R. N. P. 132–36; Best, ss. 220, &c.; Phipson, 519–25.

The old rule which applied to all attested documents was restricted to those required to be attested by law, by 17 & 18 Vict. c. 125, s. 26, replaced by 28 & 29 Vict. c. 18, ss. 1 & 7, and now repealed by S. L. R. Act, 1892.

NOTE XXIX.

(TO ARTICLE 72.—NOTICE TO PRODUCE.)

For these rules in greater detail, see 1 Ph. Ev. 452–3, and 2 Ph. Ev. 272–89; Taylor, ss. 449–56; R. N. P. 7–14; Phipson, 543–46.

The principle of all the rules is fully explained in the cases cited in the foot-notes, more particularly in *Dwyer* v. *Collins*, 1852, 7 Ex. 639. In that case it is held that the object of notice to produce is "to enable the party to have the document in Court, and if he does not, to enable his opponent to give parol evidence . . . to exclude the argument that the opponent has not taken all reasonable means to procure the original, which he must do before he can be permitted to make use of secondary evidence" (pp. 647–8).

NOTE XXX.

(To Article 75.—Public Documents; Examined Copies.)

Mr. Philips (2, 196) says, that upon a plea of *nul tiel* record, the original record must be produced if it is in the same Court.

Mr. Taylor (s. 1535) says, that upon prosecutions for perjury assigned upon any judicial document the original must be produced. The authorities given seem to me hardly to bear out either of the statements. They show that the production of the original in such cases is the usual course, but not, I think, that it is necessary. The case of *Lady Dartmouth* v. *Roberts*, 1812, 16 Ea. 334, is too wide for the proposition for which it is cited. The matter, however, is of little practical importance.

NOTE XXXI.

(To Articles 77 & 78.—Public Documents; Exemplifications.)

The learning as to exemplifications and office-copies will be found in the following authorities: Gilbert's 'Law of

Evidence,' 11–20; Buller, 'Nisi Prius,' 228, and following; Starkie, 256–66 (fully and very conveniently); 2 Ph. Ev. 196–200; Taylor, ss. 1536–42; R. N. P. 96–102. The second paragraph of Article 77 is founded on *Appleton* v. *Braybrook*, 1817, 6 M. & S. at p. 39.

As to exemplifications not under the Great Seal, it is remarkable that the Judicature Acts give no seal to the Supreme Court, or the High Court, or any of its divisions.

NOTE XXXII.

(To Article 90.—Documents Exclusive Evidence.)

The distinction between this and the following article is, that Article 90 defines the cases in which documents are exclusive evidence of the transactions which they embody, while Article 91 deals with the interpretation of documents by oral evidence. The two subjects are so closely connected together, that they are not usually treated as distinct; but they are so in fact. A and B make a contract of marine insurance on goods, and reduce it to writing. They verbally agree that the goods are not to be shipped in a particular ship, though the contract makes no such reservation. They leave unnoticed a condition usually understood in the business of insurance, and they make use of a technical expression, the meaning of which is not commonly known. The law does not permit oral evidence to be given of the exception as to the particular ship. It does permit oral evidence to be given to annex the condition; and thus far it decides that for one purpose the document shall, and that for another it shall not, be regarded as exclusive evidence of

the terms of the actual agreement between the parties. It also allows the technical term to be explained, and in doing so it interprets the meaning of the document itself. The two operations are obviously different, and their proper performance depends upon different principles. The first depends upon the principle that the object of reducing transactions to a written form is to take security against bad faith or bad memory, for which reason a writing is presumed as a general rule to embody the final and considered determination of the parties to it. The second depends on a consideration of the imperfections of language, and of the inadequate manner in which people adjust their words to the facts to which they apply.

The rules themselves are not, I think, difficult either to state, to understand, or to remember; but they are by no means easy to apply, inasmuch as from the nature of the case an enormous number of transactions fall close on one side or the other of most of them. Hence the exposition of these rules, and the abridgment of all the illustrations of them which have occurred in practice, occupy a very large space in the different text writers. They will be found in 2 Ph. Ev. 332–424; Taylor, ss. 1128–1228; Star. 648–731; Best (very shortly and imperfectly), ss. 226–9; R. N. P. (an immense list of cases), 16–33; Phipson, 566–673.

As to paragraph (4), which is founded on the case of *Goss* v. *Lord Nugent*, it is to be observed that the paragraph is purposely so drawn as not to touch the question of the effect of the Statute of Frauds. It was held in effect in *Goss* v. *Lord Nugent* that if by reason of the Statute of Frauds the substituted contract could not be enforced, it would not have

the effect of waiving part of the original contract; but it seems the better opinion that a verbal rescission of a contract good under the Statute of Frauds would be good. See *Noble* v. *Ward*, 1867, L. R. 2 Ex. 135, and Pollock on 'Contracts' (8th ed.), 261, note (i). A contract by deed can be released only by deed, and this case also would fall within the proviso to paragraph (4).

The cases given in the illustrations will be found to mark sufficiently the various rules stated. As to paragraph (5), a very large collection of cases will be found in the notes to *Wigglesworth* v. *Dallison*, 1779, 1 S. L. C., 535–60, but the consideration of them appears to belong rather to mercantile law than to the Law of Evidence. For instance, the question what stipulations are consistent with, and what are contradictory to, the contract formed by subscribing a bill of exchange, or the contract between an insurer and an underwriter, are not questions of the Law of Evidence.

NOTE XXXIII.

(To ARTICLE 91.—ORAL INTERPRETATION OF DOCUMENTS.)

Perhaps the subject-matter of this article does not fall strictly within the Law of Evidence, but it is generally considered to do so; and as it has always been treated as a branch of the subject, I have thought it best to deal with it.

The general authorities for the propositions in the text are the same as those specified in the last note; but the great authority on the subject is the work of Vice-Chancellor Wigram on 'Extrinsic Evidence.' Article 91, indeed, will be found, on examination, to differ from the six propositions of

Vice-Chancellor Wigram only in its arrangement and form of expression, and in the fact that it is not restricted to wills. It will, I think, be found, on examination, that every case cited by the Vice-Chancellor might be used as an illustration of one or the other of the propositions contained in it.

It is difficult to justify the line drawn between the rule as to cases in which evidence of expressions of intention is admitted and cases in which it is rejected (paragraph 7, illustrations (*k*), (*l*), (*m*), and paragraph 8, illustrations (*n*) and (*o*)). When placed side by side, such cases as *Doe* v. *Hiscocks* (illustration (*k*)) and *Doe* v. *Needs* (illustration (*n*)) produce a singular effect. The vagueness of the distinction between them is indicated by the case of *Charter* v. *Charter*, 1871, L. R. 2 P. & M. 315. In this case the testator Forster Charter appointed "my son Forster Charter" his executor. He had two sons, William Forster Charter and Charles Charter, and many circumstances pointed to the conclusion that the person whom the testator wished to be his executor was Charles Charter. Lord Penzance not only admitted evidence of all the circumstances of the case, but expressed an opinion (p. 319) that, if it were necessary, evidence of declarations of intention might be admitted under the rule laid down by Lord Abinger in *Hiscocks* v. *Hiscocks*, because part of the language employed ("my son —— Charter") applied correctly to each son, and the remainder, "Forster," to neither. This mode of construing the rule would admit evidence of declarations of intention both in cases falling under paragraph 8, and in cases falling under paragraph 7, which is inconsistent not only with the reasoning

in the judgment, but with the actual decision in *Doe* v. *Hiscocks*. It is also inconsistent with the principles of the judgment in the later case of *Allgood* v. *Blake*, 1873, L. R. 8 Ex. 160, where the rule is stated by Blackburn, J., as follows: "In construing a will, the Court is entitled to put itself in the position of the testator, and to consider all material facts and circumstances known to the testator with reference to which he is to be taken to have used the words in the will, and then to declare what is the intention evidenced by the words used with reference to those facts and circumstances which were (or ought to have been) in the mind of the testator when he used those words." After quoting Wigram on 'Extrinsic Evidence,' and *Doe* v. *Hiscocks*, he adds: "No doubt, in many cases the testator has, for the moment, forgotten or overlooked the material facts and circumstances which he well knew. And the consequence sometimes is that he uses words which express an intention which he would not have wished to express, and would have altered if he had been reminded of the facts and circumstances. But the Court is to construe the will as made by the testator, not to make a will for him; and therefore it is bound to execute his expressed intention, even if there is great reason to believe that he has by blunder expressed what he did not mean." The part of Lord Penzance's judgment above referred to was unanimously overruled in the House of Lords; though the Court, being equally divided as to the construction of the will, refused to reverse the judgment, upon the principle *præsumitur pro negante*.

Conclusive as the authorities upon the subject are, it may not, perhaps, be presumptuous to express a doubt whether

the conflict between a natural wish to fulfil the intention which the testator would have formed if he had recollected all the circumstances of the case; the wish to avoid the evil of permitting written instruments to be varied by oral evidence; and the wish to give effect to wills, has not produced in practice an illogical compromise. The strictly logical course, I think, would be either to admit declarations of intention both in cases falling under paragraph 7, and in cases falling under paragraph 8, or to exclude such evidence in both classes of cases, and to hold void for uncertainty every bequest or devise which was shown to be uncertain in its application to facts. Such a decision as that in *Stringer* v. *Gardiner* (see illustration (*m*)), the result of which was to give a legacy to a person whom the testator had no wish to benefit, and who was not either named or described in his will, appears to me to be a practical refutation of the principle or rule on which it is based.

Of course every document whatever must to some extent be interpreted by circumstances. However accurate and detailed a description of things and persons may be, oral evidence is always wanted to show that persons and things answering the description exist; and therefore in every case whatever, every fact must be allowed to be proved to which the document does, or probably may refer; but if more evidence than this is admitted, if the Court may look at circumstances which affect the probability that the testator would form this intention or that, why should declarations of intention be excluded? If the question is, "What did the testator say?" why should the Court look at the circumstances that he lived with Charles,

and was on bad terms with William? How can any amount of evidence to show that the testator intended to write "Charles" show that what he did write means "Charles"? To say that "Forster" means "Charles," is like saying that "two" means "three." If the question is, "What did the testator wish?" why should the Court refuse to look at his declarations of intention? And what third question can be asked? The only one which can be suggested is, "What would the testator have meant if he had deliberately used unmeaning words?" The only answer to this would be, he would have had no meaning, and would have said nothing, and his bequest should be *pro tanto* void.

NOTE XXXIV.

(TO ARTICLE 92.—EVIDENCE BY STRANGERS TO DOCUMENTS.)

See 2 Ph. Ev. 364; Star. 726; Taylor (from Greenleaf), s. 1149, Phipson, 577. Various cases are quoted by these writers in support of the first part of the proposition in the article; but *R.* v. *Cheadle* is the only one which appears to me to come quite up to it. They are all settlement cases.

NOTE XXXV.

(TO CHAPTER XIII.—PRODUCTION AND EFFECT OF EVIDENCE.)

In this and the following chapter many matters usually introduced into a treatise on evidence are omitted, because they appear to belong either to the subject of pleading, or to different branches of Substantive Law. For instance.

the rules as to the burden of proof of negative averments in criminal cases (1 Ph. Ev. 555, &c.; Russ. Cri. 1954–7) belong rather to criminal procedure than to evidence. Again, in every branch of Substantive Law there are presumptions more or less numerous and important, which can be understood only in connection with those branches of the law. Such are the presumptions as to the ownership of property, as to consideration for a bill of exchange, as to many of the incidents of the contract of insurance. Passing over all these, I have embodied in Chapter XIV. those presumptions only which bear upon the proof of facts likely to be proved on a great variety of different occasions, and those estoppels only which arise out of matters of fact, as distinguished from those which arise upon deeds or judgments.

NOTE XXXVI.

(To Article 94.—Presumption of Innocence.)

The presumption of innocence belongs principally to the Criminal Law, though it has, as the illustrations show, a bearing on the proof of ordinary facts. The question, "What doubts are reasonable in criminal cases?" belongs to the Criminal Law.

NOTE XXXVII.

(To Article 101.—"Omnia Rite Acta.")

The first part of this article is meant to give the effect of the presumption, *omnia esse rite acta*, 1 Ph. Ev. 480, &c.; Taylor, ss. 139, &c.; Best, s. 353, &c. This, like all presumptions, is a very vague and fluid rule at best, and is applied to a great variety of different subject-matters.

NOTE XXXVIII.

(TO ARTICLES 102–105.—ESTOPPELS *IN PAIS*.)

These articles embody the principal cases of estoppels *in pais*, as distinguished from estoppels by deed and by record. As they may be applied in a great variety of ways and to infinitely various circumstances, the application of these rules has involved a good deal of detail. The rules themselves appear clearly enough on a careful examination of the cases. The latest and most extensive collection of cases is to be seen in 2 S. L. C. 866–911, where the cases referred to in the text and many others are abstracted. See, too, 1 Ph. Ev. 350–3; Taylor, ss. 101–3, 774–82; Best, s. 543; Phipson, 684–87.

Article 102 contains the rule in *Pickard* v. *Sears*, 1837, 6 A. & E. at p. 474, as interpreted and limited by Parke, B., in *Freeman* v. *Cooke*, 1848, 2 Ex. 654, 663. The second paragraph of the article is founded on the application of this rule to the case of a negligent act causing fraud. The rule, as expressed, is collected from a comparison of the following cases: *Bank of Ireland* v. *Evans*, 1855, 5 H. L. Ca. 389; *Swan* v. *North British Australasian Company*, which was before three Courts, see 1859, 7 C. B. (N.S.), 400; 1862, 7 H. & N. 603; 1863, 2 H. & C. 175, where the judgment of the majority of the Court of Exchequer was reversed; and *Halifax Guardians* v. *Wheelwright*, 1875, L. R. 10 Ex. 183, in which all the cases are referred to. All of these refer to *Young* v. *Grote*, 1827, 4 Bing. 253, and its authority has always been upheld, though not always on the same ground. The rules on this subject are stated in general

terms in *Carr* v. *L. & N. W. Railway*, 1875, 10 C. P. 316–17.

It would be difficult to find a better illustration of the gradual way in which the judges construct rules of evidence, as circumstances require it, than is afforded by a study of these cases.

NOTE XXXIX.

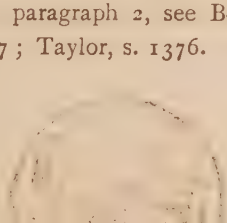
(To Chapter XV.—Competency of Witnesses.)

The law as to the competency of witnesses was formerly the most, or nearly the most, important and extensive branch of the Law of Evidence. Indeed, rules as to the incompetency of witnesses, as to the proof of documents, and as to the proof of some particular issues, are nearly the only rules of evidence treated of in the older authorities. Great part of Bentham's 'Rationale of Judicial Evidence' is directed to an exposure of the fundamentally erroneous nature of the theory upon which these rules were founded; and his attack upon them has met with a success so nearly complete that it has itself become obsolete. The history of the subject is to be found in Mr. Best's work, book ii. part i. ch. ii. ss. 132–88. See, too, Taylor, s. 1342–1393, and R. N. P. 161–5. As to the old law, see 1 Ph. Ev. 5 *et seq.*, 104.

NOTE XL.

(To Article 107.—What Witnesses Incompetent.)

The authorities for the first paragraph are given at great length in Best, ss. 146–65. See, too, Taylor, s. 1375; Phipson, 449–457. As to paragraph 2, see Best, s. 148; 1 Ph. Ev. 7; 2 Ph. Ev. 457; Taylor, s. 1376.



NOTE XLI.

(TO ARTICLE 108.—COMPETENCY IN CRIMINAL CASES.)

At Common Law the parties and their husbands and wives were incompetent in all cases. This incompetency was removed as to the parties in civil, but not in criminal cases, by 14 & 15 Vict. c. 99, s. 2; and as to their husbands and wives, by 16 & 17 Vict. c. 83, ss. 1, 2. But sect. 2 expressly reserved the Common Law as to criminal cases and proceedings instituted in consequence of adultery.

The words relating to adultery were repealed by 32 & 33 Vict. c. 68, s. 3, which is the authority for Article 109.

Persons interested and persons who had been convicted of certain crimes were also incompetent witnesses, but their incompetency was removed by 6 & 7 Vict. c. 85.

Various modern statutes mentioned in Note 1, p. 124, made an accused person and his or her wife or husband competent witnesses in various cases, and now the Criminal Evidence Act, 1898, has removed their incompetency to the extent mentioned in the text. The law on the subject cannot, however, be correctly stated without reference to the old Common Law Rule.

NOTE XLII.

(TO ARTICLE 111.—PRIVILEGE OF JUDGES AND WITNESSES.)

The cases on which these articles are founded are only Nisi Prius decisions; but as they are quoted by writers of eminence (1 Ph. Ev. 139; Taylor, s. 938), I have referred to them.

In the trial of Lord Thanet, for an attempt to rescue Arthur O'Connor, Serjeant Shepherd, one of the special commissioners, before whom the riot took place in court at Maidstone, gave evidence, *R.* v. *Lord Thanet*, 1799, 27 S. T. at p. 836.

I have myself been called as a witness on a trial for perjury to prove what was said before me when sitting as an arbitrator. The trial took place before Mr. Justice Hayes at York, in 1869. See, however, Article 123B.

As to the case of an advocate giving evidence in the course of a trial in which he is professionally engaged, see several cases cited and discussed in Best, ss. 184–6.

In addition to those cases, reference may be made to the trial of Horne Tooke for a libel in 1777, when he proposed to call the Attorney-General (Lord Thurlow), 20 S. T. at p. 740. These cases do not appear to show more than that, as a rule, it is for obvious reasons improper that those who conduct a case as advocates should be called as witnesses in it. Cases, however, might occur in which it might be absolutely necessary to do so. For instance, a solicitor engaged as an advocate might, not at all improbably, be the attesting witness to a deed or will.

NOTE XLIII.

(To Article 115.—Professional Communications.)

This article sums up the rule as to professional communications, every part of which is explained at great length, and to much the same effect, 1 Ph. Ev. 105–122; Taylor, ss. 911–18A; Best, s. 581. See, too, Phipson, 201–209. It

is so well established and so plain in itself that it requires only negative illustrations. It is stated at length by Lord Brougham in *Greenough* v. *Gaskell*, 1833, 1 M. & K. 98. The last leading case on the subject is *R.* v. *Cox and Railton*, 1884, 14 Q. B. D. 153. Leges Henrici Primi, v. 17: "Caveat sacerdos ne de hiis qui ei confitentur peccata alicui recitet quod ei confessus est, non propinquis, non extraneis. Quod si fecerit deponetur et omnibus diebus vitæ suæ ignominiosus peregrinando pœniteat." 1 M. 508.

NOTE XLIV.

(To Article 117.—Privilege of Clergymen and Priests.)

The question whether clergymen, and particularly whether Roman Catholic priests, can be compelled to disclose confessions made to them professionally, has never been solemnly decided in England, though it is stated by the text writers that they can. See 1 Ph. Ev. 109; Taylor, ss. 916–17; R. N. P. 172; Roscoe, Cr. Ev. 171 and 1127; Starkie, 40. The question is discussed at some length in Best, ss. 583–4; and a pamphlet was written to maintain the existence of the privilege by Mr. Baddeley in 1865. Mr. Best shows clearly that none of the decided cases are directly in point, except *Butler* v. *Moore*, 1802, MacNally, 253–4, and possibly *R.* v. *Sparkes*, which was cited by Garrow in arguing *Du Barré* v. *Livette* before Lord Kenyon, 1791, 1 Pea. 108. The report of his argument is in these words: "The prisoner being a Papist, had made a confession before a Protestant clergyman of the crime for which he was indicted; and that

confession was permitted to be given in evidence on the trial" (before Buller, J.), "and he was convicted and executed." The report is of no value, resting as it does on Peake's note of Garrow's statement of a case in which he was probably not personally concerned; and it does not appear how the objection was taken, or whether the matter was ever argued. Lord Kenyon, however, is said to have observed: "I should have paused before I admitted the evidence there admitted."

Mr. Baddeley's argument is in a few words, that the privilege must have been recognised when the Roman Catholic religion was established by law, and that it has never been taken away.

I think that the modern Law of Evidence is not so old as the Reformation, but has grown up by the practice of the Courts, and by decisions in the course of the last two centuries. It came into existence at a time when exceptions in favour of auricular confessions to Roman Catholic priests were not likely to be made. The general rule is that every person must testify to what he knows. An exception to the general rule has been established in regard to legal advisers, but there is nothing to show that it extends to clergymen, and it is usually so stated as not to include them. This is the ground on which the Irish Master of the Rolls (Sir Michael Smith) decided the case of *Butler* v. *Moore*, *supra*. It was a demurrer to a rule to administer interrogatories to a Roman Catholic priest as to matter which he said he knew, if at all, professionally only. The judge said, "It was the undoubted legal constitutional right of every subject of the realm who has a cause depending,

to call upon a fellow-subject to testify what he may know of the matters in issue; and every man is bound to make the discovery, unless specially exempted and protected by law. It was candidly admitted that no special exemption could be shown in the present instance, and analogous cases and principles alone were relied upon." The analogy, however, was not considered sufficiently strong.

Several judges have, for obvious reasons, expressed the strongest disinclination to compel such a disclosure. Thus Best, C.J., said, "I, for one, will never compel a clergyman to disclose communications made to him by a prisoner; but if he chooses to disclose them I shall receive them in evidence" (*obiter*, in *Broad* v. *Pitt*, 1828, 3 C. & P. 518). Alderson, B., thought (rather, it would seem, as a matter of good feeling than as a matter of positive law) that such evidence should not be given. *R.* v. *Griffin*, 1853, 6 Cox, Cr. Ca. 219.

NOTE XLV.

(To Articles 126, 127, 128.—Examination, etc., of Witnesses.)

These articles relate to matters almost too familiar to require authority, as no one can watch the proceedings of any Court of Justice without seeing the rules laid down in them continually enforced. The subject is discussed at length in 2 Ph. Ev. pt. 2, chap. x. p. 456, &c.; Taylor, s. 1394, &c.; Phipson, 464-84; see, too, Best, s. 631, &c. In respect to leading questions, it is said, "It is entirely a question for the presiding judge whether or not the examination is being conducted fairly." R. N. P. 166.

NOTE XLVI.

(TO ARTICLE 129.—LIMITS OF CROSS-EXAMINATION.)

This article states a practice which is now common, and which never was more strikingly illustrated than in the case referred to in the illustration. But the practice which it represents is modern; and I submit that it requires the qualification suggested in the text. I shall not believe, unless and until it is so decided upon solemn argument, that by the law of England a person who is called to prove a minor fact, not really disputed, in a case of little importance, thereby exposes himself to having every transaction of his past life, however private, inquired into by persons who may wish to serve the basest purposes of fraud or revenge by doing so. Suppose, for instance, a medical man were called to prove the fact that a slight wound had been inflicted, and been attended to by him, would it be lawful, under pretence of testing his credit, to compel him to answer upon oath a series of questions as to his private affairs, extending over many years, and tending to expose transactions of the most delicate and secret kind, in which the fortune and character of other persons might be involved? If this is the law, it should be altered. The following section of the Indian Evidence Act (1 of 1872) may perhaps be deserving of consideration. After authorising, in sect. 147, questions as to the credit of the witness, the Act proceeds as follows in sect. 148 :—

"If any such question relates to a matter not relevant to the suit or proceeding, except so far as it affects the credit

of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising this discretion, the Court shall have regard to the following considerations:—

"(1) Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies.

"(2) Such questions are improper if the imputation which they convey relates to matters so remote in time or of such a character that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies.

"(3) Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence."

Order XXXVI., rule 38, expressly gives the judge a discretion which was much wanted, and which I believe he always possessed.

NOTE XLVII.

(TO ARTICLE 131.—STATEMENTS INCONSISTENT WITH PRESENT TESTIMONY.)

The contents of this section are intended to represent sects. 3 and 4 of the Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), which re-enacted sects. 22 and 23 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125),

now repealed by the Statute Law Revision Act, 1892. The two sections in question are as follows:—

3. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

4. If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

The sections are obviously ill-arranged; but apart from this, sect. 3 is so worded as to suggest a doubt whether a party to an action has a right to contradict a witness called by himself whose testimony is adverse to his interests. The words, "he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence," suggest that he cannot do so unless the judge is of that opinion. This is not, and never was, the law In *Greenough*

v. *Eccles*, 1859, 5 C. B. (N.S.), at p. 802, Williams, J., says: "The law was clear that you might not discredit your own witness by general evidence of bad character; but you might, nevertheless, contradict him by other evidence relevant to the issue;" and he adds, at p. 803: "It is impossible to suppose that the Legislature could have really intended to impose any fetter whatever on the right of a party to contradict his own witness by other evidence relevant to the issue—a right not only established by authority, but founded on the plainest good sense."

Cockburn, L.C.J., in the same case, at p. 806, said of the 22nd section of the Common Law Procedure Act, 1854: "There has been a great blunder in the drawing of it, and on the part of those who adopted it. . . . Perhaps the better course is to consider the second branch of the section as altogether superfluous and useless" (p. 806). On this authority I have omitted it.

For many years before the Common Law Procedure Act of 1854 it was held, in accordance with *Queen Caroline's Case*, 1820, 2 Br. & Bing. 286–91, that a witness could not be cross-examined as to statements made in writing, unless the writing had been first proved. The effect of this rule in criminal cases was that a witness could not be cross-examined as to what he had said before the magistrates without putting in his deposition, and this gave the prosecuting counsel the reply. Upon this subject rules of practice were issued by the judges in 1837, when the Prisoner's Counsel Act came into operation. The rules are published in 7 C. & P. 676. They would appear to have been superseded by the 28 & 29 Vict. c. 18.

NOTE XLVIII.

The Statute Law relating to the subject of evidence may be regarded either as voluminous or not, according to the view taken of the extent of the subject.

The number of statutes classified under the head "Evidence" in Chitty's Statutes is 32. The number referred to under that head in the Index to the Revised Statutes is 96. Many of these, however, relate only to the proof of particular documents, or matters of fact which may become material under special circumstances.

Of these I have noticed a few, which, for various reasons, appear important. Such are: 6 & 7 Geo. 5, c. 50, s. 42 (1) (see Article 11); 9 Geo. IV. c. 14, s. 1, amended by 19 & 20 Vict. c. 97, s. 13 (see Article 17); 9 Geo. IV. c. 14, s. 3; 3 & 4 Will. IV. c. 42 (see Article 28); 41 & 42 Vict. c. 11 (Article 36); 7 & 8 Geo. IV. c. 28, s. 11, amended by 6 & 7 William IV. c. 111; 24 & 25 Vict. c. 96, s. 116; 24 & 25 Vict. c. 99, s. 37; 61 & 62 Vict. c. 36, s. 1 (*f*) (see Articles 56 and 108); 8 & 9 Vict. c. 10, s. 6; 48 & 49 Vict. c. 69, s. 4 (Article 121); 7 & 8 Will. III. c. 3, ss. 2–4; 39 & 40 Geo. III. c. 93 (Article 122); 11 & 12 Vict. c. 42, s. 17 (Article 140); 30 & 31 Vict. c. 35, s. 6 (Article 141); 53 & 54 Vict. c. 37, s. 6 (Article 141A); 57 & 58 Vict. c. 60, s. 691 (Article 142); 4 Edw. 7, c. 15, ss. 13, 14 (Article 141B).

Many, again, refer to pleading and practice rather than evidence, in the sense in which I employ the word. Such are the Acts which enable evidence to be taken on commission

if a witness is abroad, or relate to the administration of interrogatories.

Those which relate directly to the subject of evidence as defined in the Introduction, are the eleven following Acts :—

1.

46 *Geo. III. c.* 37 (1 section ; see Article 120). This Act qualifies the rule that a witness is not bound to answer questions which criminate himself by declaring that he is not excused from answering questions which fix him with a civil liability.

2.

6 & 7 *Vict. c.* 85. This Act abolishes incompetency from interest or crime (4 sections ; see Article 106).

3.

8 & 9 *Vict. c.* 113 : "An Act to facilitate the admission in evidence of certain official and other documents" (8th August, 1845 ; 7 sections).

S. 1, after preamble reciting that many documents are, by various Acts, rendered admissible in proof of certain particulars if authenticated in a certain way, enacts, *inter alia*, that proof that they were so authenticated shall not be required if they purport to be so authenticated. (Article 79.)

S. 2. Judicial notice to be taken of signatures of certain judges. (Article 58, latter part of clause 8.)

S. 3. Certain Acts of Parliament, proclamations, &c., may be proved by copies purporting to be King's printers' copies. (Article 81.)

S. 4. Penalty for forgery, &c. This is omitted as belonging to the Criminal Law.

4.

14 & 15 *Vict. c.* 99: "The Evidence Act, 1851" (7th August, 1851; 20 sections):—

S. 2 makes parties admissible witnesses, except in certain cases. (Effect given in Articles 106 & 108.)

S. 3. Persons accused of crime, and their husbands and wives, not to be competent. Implicitly repealed by the Criminal Evidence Act, 1898. (Article 108.)

S. 4. The first three sections not to apply to proceedings instituted in consequence of adultery. Repealed by 32 & 33 Vict. c. 68. (Effect of repeal, and of s. 3 of the last-named Act, given in Article 109.)

S. 5. None of the sections above mentioned to affect the Wills Act of 1838 (7 Will. IV. & 1 Vict. c. 26). (Omitted as part of the Laws of Wills.)

S. 6. The Common Law Courts authorised to grant inspection of documents. (Omitted as part of the Law of Civil Procedure.)

S. 7. Mode of proving proclamations, treaties, &c. (Article 84.)

S. 8. Proof of qualification of apothecaries. (Omitted from the text as part of the law relating to medical men; but see Table, *post*, p. 236.)

Ss. 9, 10, 11. Documents admissible either in England or in Ireland, or in the colonies, without proof of seal, &c., admissible in all. (Article 80.)

S. 13. Proof of previous convictions. (Omitted from the

text as belonging to Criminal Procedure; but see Table, *post*, p. 232.)

S. 14. Certain documents provable by examined copies or copies purporting to be duly certified. (Article 79, last paragraph.)

S. 15. Certifying false documents a misdemeanour. (Omitted as belonging to Criminal Law.) Cf. 3 & 4 Vict. c. 27, s. 20.

S. 16. Who may administer oaths. (Article 124.)

S. 17. Penalties for forging certain documents. (Omitted as belonging to Criminal Law.)

S. 18. Act not to extend to Scotland. (Omitted.)

S. 19. Meaning of the word "Colony." (Article 80, note 1.)

5.

28 & 29 *Vict. c.* 18: "The Criminal Procedure Act,[1] 1865" (9th May, 1865; 10 sections). This Act re-enacts ss. 22–27 of the Common Law Procedure Act, 1854, which are now repealed by the Statute Law Revision Act, 1892.

S. 1. Sects. 3–8 to apply to all courts and causes, criminal as well as civil.

S. 2. Summing up of evidence in criminal cases. (Omitted as being procedure.)

S. 3. How far a party may discredit his own witnesses. (Articles 131, 133, and see Note XLVII.)

S. 4. Proof of contradictory statements by a witness under cross-examination. (Article 131.)

S. 5. Cross-examination as to previous statements in writing. (Article 132.)

[1] This is the title given to the Act by the Short Titles Act, 1896; it seems to be based exclusively on sect. 2 of the Act.

S. 6. Proof of previous conviction of a witness may be given. (Article 130 (1).)

S. 7. Attesting witnesses need not be called unless writing requires attestation by law. (Article 69.)

S. 8. Comparison of disputed handwriting. (Articles 49 and 52.)

6.

31 & 32 *Vict. c.* 37 (25th June, 1868; 6 sections):—

S. 1. Short title, "The Documentary Evidence Act," 1868.

S. 2. Certain documents may be proved in particular ways. (Article 83, and for schedule referred to, see note to this article.)

S. 3. The Act to be in force in the colonies. (Article 83.)

S. 4. Punishment of forgery. (Omitted as forming part of the Criminal Law.)

S. 5. Interpretation clauses embodied (where necessary) in Article 83.

S. 6. Act to be cumulative in Common Law. (Implied in Article 73.)

7.

32 & 33 *Vict. c.* 68 (9th August, 1869; 6 sections):—

S. 1. repeals part of 14 & 15 Vict. c. 99, s. 4, and part of 16 & 17 Vict. c. 83, s. 2. (The effect of this repeal is given in Article 109; and see Note XLI. S. 1 is repealed S. L. R. 1883).

S. 2. Parties competent in actions for breach of promise of marriage, but must be corroborated. See Articles 106 and 121.)

S. 3. Husbands and wives competent in proceedings in

consequence of adultery, but not to be compelled to answer certain questions. (Article 109.)

S. 4. Atheists rendered competent witnesses. (Repealed by Oaths Act, 1888.)

S. 5. Short title: "The Evidence further Amendment Act, 1869."

S. 6. Act does not extend to Scotland.

8.

48 & 49 *Vict. c.* 69: "The Criminal Law Amendment Act, 1885" (20 sections).

S. 4. Unsworn evidence of a child admitted in cases of defilement of a girl under thirteen; but corroboration needed. (Article 123A.)

9.

51 & 52 *Vict. c.* 46 and 9 *Edw.* 7, *c.* 39: "The Oaths Acts, 1888 and 1909" (7 sections and 4 sections).

S. 1 (1888). A person objecting to be sworn may make an affirmation. (Article 123.)

S. 2. Form of affirmation. (Article 123.)

S. 3. Oath valid, though no religious belief. (Article 123.)

S. 4. Form of written affirmation.

S. 5. Swearing as in Scotland. (Article 124.)

S. 6. Repeals.

S. 7. Short title.

The Act of 1909 relates to the form of oaths and the manner of administering them.

10.

8 *Edw.* 7, *c.* 67, "The Children Act," 1908 (134 sections).

S. 30. Unsworn evidence of a child admitted in cases of cruelty to children, etc.; but corroboration needed. (Article 123A.) Extended to all cases by 4 & 5 Geo. 5, c. 58, s. 28 (2).

II.

61 & 62 *Vict. c.* 36: "The Criminal Evidence Act, 1898" (7 sections).

S. 1. Person charged with offence, and his or her wife or husband competent witness. (Article 108.)

S. 2. When such person is called. (Omitted as procedure.)

S. 3. Right of reply. (Omitted as procedure.)

S. 4. When husband or wife a compellable witness. (Article 108.)

Ss. 5, 6, 7. Application of the Article to Scotland, Ireland. Courts-martial, etc.

These are the only Acts which deal with the Law of Evidence as I have defined it. It will be observed that they relate to three subjects only—the competency of witnesses, the proof of certain classes of documents, and certain details in the practice of examining witnesses. Thus, when the Statute Law upon the subject of Evidence is sifted and put in its proper place as part of the general system, it appears to occupy a very subordinate position in it. The twelve statutes above mentioned are the only ones which really form part of the Law of Evidence, and their effect is fully given in twenty-two[1] articles of the Digest, some of which contain other matter besides.

[1] 49, 52, 58, 69, 79, 80, 81, 83, 84, 106, 108, 109, 120, 121, 123, 123A, 124, 125, 130, 131, 132, 133.

APPENDIX.

THE following Table, showing the effect of various Statutes in making certain documents evidence of certain facts, will probably be found useful to the practitioner. It is copied, with a few additions, from 'Wills on Evidence,' by the generous permission of the author of that work.

1. In the first column of the Table no reference has been made to the statutes 8 & 9 Vict. c. 113, s. 1, and 14 & 15 Vict. c. 99, s. 14. The cases in which these provisions are brought into play are stated in Article 79.

2. In the third column the words "copy," "office copy," "certified copy," "authorised," "signed," "sealed," "stamped," "printed," "published," &c., &c., &c., must be read as if the words "purporting to be" were in each case inserted before them. No evidence, nor anything but the production of the copy or other document specified, is required except when it is so stated.

3. In the same column wherever the words "examined copy," "verified," "proved," &c., &c., are used, evidence will be necessary accordingly.

Title, and Source.	Facts to be proved.	Mode of Proof; and see p. 221.
Acknowledgments of Married Women. (i) Made before 1883. 3 & 4 Will. 4, c. 74, s. 84. Ord. LXI. rr. 1, 1a. 45 & 46 Vict. c. 39, s. 7. (ii) Made since 1882. Stat. last cited, and Rules Dec. 1882, rr. 5, 6.	(i) Married woman's acknowledgment of a deed as her deed. (ii) Do. do.	(i) Office copy from Central Office of filed certificate of acknowledgment. (And see "Public Records.") (ii) Married woman's deed with memorandum of acknowledgment thereon signed by a person authorised to take the acknowledgment.
Arrangement, Deeds of. 4 & 5 Geo. 5, c. 47, ss. 5, 6, 25.	Execution, due registration and terms of deed of arrangement.	Office copy from Central Office of the registered copy deed of arrangement.
Assurance Companies. 9 Edw. 7. c. 49, s. 21.	That a document is a copy of a document deposited under the Act with the Board of Trade, and certified by the Registrar, or any person appointed in that behalf by the President of the Board, to be so deposited.	The document in question purporting to be certified by the Registrar to be such a copy.
Bankers' Books. 42 & 43 Vict. c. 11. 45 & 46 Vict. c. 72, s. 11 (2).	Entries in bankers' books (*i.e.* ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank), and the matters, transactions, and accounts therein recorded.	Examined copy of the entries, verified by oral evidence in court or by affidavit, after proof by a partner or official either oral or by affidavit that the book was one of the ordinary books of the bank, that the entries were made in the usual and ordinary course of business, and that the book is in the custody

Bankruptcy.		
4 & 5 Geo. 5, c, 59, s. 137.	(a) Any facts stated in any notice inserted in the *London Gazette*, as, *e.g.*—	(a) Copy of the *Gazette* containing the notice.
s. 18 (2), r. 193.....	adjudication,	
s. 29 (3), r. 194.....	annulment thereof,	
r. 298.....	appointment of trustee,	
Rules 1890, r. 26 (2)	approval of scheme or composition,	
s. 28 (3), r. 51	discharge,	
s. 11	receiving order,	
r. 310.....	release of trustee,	
r. 303.....	removal of trustee.	
s. 139.	(b) Petition, order or certificate of a bankruptcy court; and instrument, affidavit or document made or used in the course of any proceedings under the Act.	(b) The original petition, &c., sealed with the seal of the court, or signed by a judge thereof, or a copy thereof so sealed or signed, or a copy certified as a true copy by any registrar of the court.
s. 144.	(c) Order or certificate of the Board of Trade made under the Act.	(c) Original order or certificate sealed with the seal of the Board or signed by a secretary or assistant secretary of the Board, or by any person authorised in that behalf by the President of the Board. If also certified under hand of the President it is conclusive.
s. 141.	(d) Facts deposed to in a proceeding under the Act by a debtor, his wife, or a witness, since deceased.	(d) The deposition or a copy thereof sealed with the seal of the court.
s. 138.	(e) Proceedings at a meeting of creditors under the Act, and the regularity thereof.	(e) Minutes of proceedings signed by the chairman of the same or the next meeting.
s. 16 (14).	(f) The validity of a composition or scheme.	(f) Certificate of the official receiver that the composition or scheme has been duly accepted and approved.
s. 26 (6).	(g) The facts stated in the report of the official receiver as to conduct and affairs of bankrupt, so far as his application for discharge is concerned.	(g) The official receiver's report, produced on the bankrupt's application for his discharge.

Title, and Source.	Facts to be proved.	Mode of Proof; and see p. 221.
Baptism. 70th Canon of 1603. 52 Geo. 3, c. 146. *Re Hall's Estate* (1852), 22 L. J. Ch. 177. *Re Porter's Trusts* (1856), 25 L. J. Ch. 688. *Doe* v. *Fowler* (1850), 14 Q. B. 700.	Baptism according to the rites of the Church of England, date thereof, Christian name of child, and names of parents; and in case of baptisms since 1812, also the abode and quality, trade or profession of the parents. (See note (1), p. 243.)	An examined or certified copy of the entry of the baptism made by a minister of the parish in the register of baptism kept in the custody of a minister of the parish, *or* of the entry in the copy register transmitted to and kept in the registry of the diocese. (See note (2), p. 243.)
Bills of Sale. 41 & 42 Vict. c. 31, ss. 10, 16. 45 & 46 Vict. c. 43.	Due execution and attestation of bill of sale, terms thereof, and fact and date of registration; also fact and date of renewal of registration, if any.	Office copies of registered copy bill of sale and of affidavit of execution; also of affidavit of renewal, if any.
Births. 6 & 7 Will. 4, c. 86, ss. 35, 37, 38. 37 & 38 Vict. c. 88, ss. 1–8, 32, 38. *R.* v. *Weaver* (1873), L. R. 2, C. C. R. 85.	Fact and date (see note (3), p. 243) of birth within England or Wales, Christian name and sex of person born, names of parents, and rank or profession of father.	A copy certified under hand of registrar or registering officer of entry in register-book of births in his custody (*i.e.* book not filled up), *or* copy certified under hand of superintendent registrar of entry in register-book of births in his custody (*i.e.* register-book filled up and transmitted by register to superintendent registrar to be kept with records of his office), *or* certified copy sealed or stamped with seal of the general registry office of entry in certified copy register-book kept in that office (*i.e.* those transmitted by superintendent registrars): Provided always that such entry is signed by an informant within the meaning of the said Acts, and in the case of births since 1874 is signed by the superintendent registrar if the registration took place more than three but not more than twelve months after the birth, or is made with the authority of the Registrar General if the registration took

Burials.		
(i) Church of England. 70th Canon of 1603. 52 Geo. 3, c. 146. *Re Hall's Estate* (1852), 22 L. J. Ch. 177. *Re Porter's Trusts* (1856), 25 L. J. Ch. 688.	(i) Fact and date of burial, with name, address, and age of person buried.	(i) Examined or certified copy of the entry of the burial made by a minister of the parish in the register of burials kept in the custody of a minister of the parish, *or* of the entry in the copy register transmitted to and kept in the registry of the diocese. (See note (2), p. 243.)
(ii) Cemeteries. 10 & 11 Vict. c. 65, ss. 32, 33.	(ii) Do. do.	(ii) (iii) (iv) Examined or certified copy of the entry of the burial in the register-book belonging to the persons, board, or public body owning the cemetery or burial-ground respectively, *or* of the entry in the official copy registers transmitted by those persons or bodies respectively to the registry of the diocese. (See note (2), p. 243.)
(iii) Burial Boards. 16 & 17 Vict. c. 134, s. 8. 17 & 18 Vict. c. 87, s. 2. 20 & 21 Vict. c. 81.	(iii) Do. do.	
(iv) Other Burial Grounds. 27 & 28 Vict. c. 97.	(iv) Do. do.	
Charitable Trusts. 16 & 17 Vict. c. 137, s. 8. 18 & 19 Vict. c. 124, s. 5. 50 & 51 Vict. c. 49, s. 3.	(a) Proceedings of the Board of Charity Commissioners for England and Wales.	(a) Copy, certified by the signature of the secretary of the Board, or of any officer of the Board, authorised by an order of the Board, signed by two Commissioners, to act on behalf of the Secretary of the Board, of entries similarly certified in the minute books of the Board.
	(b) Order, certificate, scheme, or document of the Board.	(b) The original order, certificate, scheme, or document under the seal of the Board, *or* a copy, certified as aforesaid, of the entry thereof similarly certified in the minute-books of the Board.
s. 42.	(c) Contents of any deed, will, or document relating to any charity and enrolled in the books of the Board.	(c) Copy of the deed, will or document made from such books of enrolment and certified under the hand of the secretary or of one of the Commissioners.
35 & 36 Vict. c. 24, s. 6.	(d) Fact and date of valid incorporation of the trustees of any charity for religious, educational, literary, scientific, or public charitable purposes.	(d) The certificate of incorporation under the seal of the Board, *or* such certified copy of the entry thereof as mentioned above (b).

Title, and Source.	Facts to be proved.	Mode of Proof; and see p. 221.
Charitable Trusts—*contd.* 56 Vict. c. 7, s. 5.	In proceedings under this Act, any documents and facts stated in the printed reports of the Charity Commissioners appointed under 53 Geo. 3, c. 91, and other Acts for inquiring into charities.	The printed reports.
Children, Employment of. 3 Edw. 7, c. 45, s. 3 (6).	The fact that the lifting, carrying or moving of any specified weight is likely to cause injury to any child, or that any specific occupation is likely to be injurious to the life, limb, health or education of the child.	In proceedings against the employer in respect of the employment of the child, a certificate by a registered medical practitioner sent by a local authority to the employer.
Companies Acts. 8 Edw. 7, c. 69, s. 23.	(a) Title of a member of the company to share or shares or stock in the company.	(a) Certificate under the common seal of the company, specifying the share or shares or stock held by such person.
s. 33.	(b) Any matters directed or authorised to be inserted in the register of members, as	(b) The company's register of members kept at its registered office.
s. 25.	1. Names, addresses, and occupations of members, with dates of membership, shares held, and amounts paid on same;	
s. 26.	2. Annual list of members and particulars of company's capital, &c.; and	
	3. Particulars as to share warrants issued.	
s. 71.	(c) Resolutions and proceedings of general meetings of a company, or of meetings of its directors or managers, and the regularity	(c) The company's minute-books, containing minutes of such resolutions and proceedings signed by the chairman of the same or of the next meeting, *or* an examined

ss. 16, 17 *Re Barned's Banking Co., Peel's case* (1857), 2 Ch. 674. *Oakes* v. *Turquand* (1867), L. R. 2. H. L. 325, 354.	(d) The fact and date of the due incorporation of a company, that all requisitions in respect of registration have been complied with, and that company is authorised to be and is registered.	(d) A certificate of incorporation given by the Registrar
8 Ed. 7, c. 69, s. 243 (9).	(e) The terms of the whole or part of any document kept and registered at any of the offices for the registration of companies such as—	(e) Copy of the document, certified to be a true copy thereof under the hand of the Registrar or of an assistant registrar.
s. 9 (6) ...	order confirming alteration of memorandum as to objects of the company.	
s. 15	memorandum and articles of association,	
s. 28	name of transferree of a share in the company	
s. 44	notice of increase of capital or members,	
s. 51	order for reduction of capital, and approved minute,	
s. 62 (2) ...	notice of situation of registered office of company, and of any change therein,	
s. 70 (1) ...	copy of every special resolution,	
s. 75	copy of company's register of directors,	
ss. 93–97 ...	creation, enforcement and satisfaction of mortgages,	
s 172 (2) ...	report of order of dissolution,	
s. 195 (4) ...	return of general meeting for reception of full account of voluntary winding-up.	
Companies Clauses Acts. 8 & 9 Vict. c. 16, ss. 11, 12.	(a) The title of a shareholder to a specified share in the company.	(a) A certificate under the common seal of the company.

Title, and Source.	Facts to be proved.	Mode of proof; and see p. 221.
Companies Clauses Acts. —*contd.*		
8 & 9 Vict. c. 16, s. 98	(b) Appointments and contracts made by the directors, and orders and proceedings of meetings of the company, and of meetings of the directors and of committees of directors, and the regularity thereof.	(b) The company's minute-books, containing minutes of such appointments, &c., respectively signed by the chairman of the meeting at which they took place, *or* an examined or certified copy thereof.
s. 127	(c) The bye-laws of a company in cases of prosecution under the same.	(c) A written or printed copy under the common seal of the company of such bye-laws.
Companies' Mortgage Debentures. 28 & 29 Vict. c. 78, ss. 9, 27, 31, 32. 33 & 34 Vict. c. 20, s. 11.	Particulars of mortgage debentures of any company incorporated under the Companies Acts or any statute, and particulars of securities of the company upon which the issue of such mortgage debentures is issued.	An examined or certified copy or extract of or from the register of mortgage debentures or the register of securities, as the case may be, kept in the office of the land registry, *or* of or from the like registers kept in the registered office of the company.
Death. 6 & 7 Will 4, c. 86, ss. 32, 34, 37, 38. 37 & 38 Vict. c. 88, ss. 9–16, 32, 37, 38.	Fact and date of death within England or Wales of person named in the register-book, with sex, age, rank or profession, and cause of death.	A copy certified under hand of registrar or registering officer of entry in register-book of deaths in his keeping (*i.e.* book not filled up), *or* copy certified under hand of superintendent registrar of entry in register-book of deaths in his custody (*i.e.* register-book filled up and transmitted by registrar to superintendent registrar to be kept with records of his office), *or* certified copy sealed or stamped with seal of the general registry office of entry in the certified copy register-book kept in that office (*i.e.* those transmitted by the superintendent registrars): Provided always that such entry is signed by an informant within the meaning of the said Acts, *or* made upon a certificate from a

		coroner, *and*, if made more than twelve months after the death or finding of the body, and, after 1874, made with the authority of the Registrar-General and in accordance with the prescribed rules.
7 Will. 4, and 1 Vict. c. 22, s. 8.	Also the place of death when added to the entry in the register by direction of the Registrar-General.	For deaths in England and Wales before 2 March, 1827, and deaths in Scotland and Ireland, and foreign parts or on board ship, see Wills on Evidence, pp. 241–244.
Dentists.		
41 & 42 Vict. c. 33, s. 11 (4).	Matters contained in the dentists' register.	The register produced from the custody of the registrar.
11 & 12 Geo. 5, c. 21, s. 15 (2).	That any person is or was, or is or was not duly registered under the Dentists Act, 1878, or entered on any list to be kept by the registrar; *or* that any particulars are or were, or are or were not, contained in the dentists' register on such list.	A certificate purporting to be under the hand of the registrar.
Ecclesiastical Matters.		
(i) Dilapidations. 34 & 35 Vict. c. 43, ss. 34, 35.	(i) (a) Bishop's order stating the repairs to the buildings of the benefice and their cost for which the late incumbent, his executors and administrators, is or are liable,	(i) (a) Examined or certified copy of the order filed in the bishop's registry.
s. 45.	(b) Due execution of prescribed works.	(b) The surveyor's certificate *or* an examined or certified copy thereof, filed in the bishop's registry.
s. 50.	(c) Due execution of substituted works by the incumbent.	(c) Special certificate or copy as above.
(ii) Farming Leases by Incumbents, 5 & 6 Vict. c. 27, s. 14	(ii) Contents and due execution of lease by incumbent of lands belonging to the benefice, surrender, surveyor's appointment, map or plan, or copy or extract from same, certificate, valuation, or report, made in pursuance of the Act.	(ii) Office copy certified under the hand of the registrar of diocese or peculiar jurisdiction, or his deputy, of the counterpart or attested copy lease, or of other documents respectively deposited in his office.

Title, and Source.	Facts to be proved.	Mode of proof; and see page 221.
Ecclesiastical Matters—*contd.*		
(iii) Long Leases by Ecclesiastical Corporations. 21 & 22 Vict. c. 57, s. 12 (and see sect. 29 of the incorporated Act).	(iii) Contents and due execution of any lease, grant, or confirmation executed by an ecclesiastical corporation under the Act, and of any map, plan, statement, certificate, valuation, or report relating thereto.	(iii) Office copy certified under the seal of the Ecclesiastical Commissioners of the counterpart lease, grant, or confirmation or any other document respectively.
(iv) Register of Bishop. *Arnold* v. *Bishop of Bath* (1829), 5 Bing. 316. *Hartley* v. *Cook* (1832), 5 C. & P. 441.	(iv) Contents of any document or entry properly entered in the register.	(iv) Examined or certified copy of any such document or entry respectively.
(v) Relinquishment of Preferment. 33 & 34 Vict. c. 91, s. 7.	(v) Contents of deed of relinquishment and its due execution, enrolment, and recording in the registry, and the fulfilment of all other requirements of the Act.	(v) Copy of the record of the deed in the registry of the diocese, duly extracted and certified by the registrar of the bishop.
(vi) Tithe Apportionment. 6 & 7 Will. 4, c. 71, ss. 2, 64. *Wilberforce* v. *Hearfield* (1877), 5 Ch. D. 709. 45 & 46 Vict. c. 38, s. 48. 52 & 53 Vict. c. 30, s. 2.	(vi) Contents of and facts recited in any confirmed instrument of apportionment, or confirmed agreement to give land instead of tithes or rent-charge, and of any map or plan annexed to such instrument or agreement. (See note (4), p. 244.)	(vi) Copy or extract sealed or stamped with the seal of the Board of Agriculture of or from the copy of such confirmed instrument or agreement respectively, deposited in the registry of the diocese, *or* of or from that deposited and kept with the public books, writings, and papers of the parish, *and* of or from any map or plan annexed thereto respectively. (As to custody of copy deposited with books of parish, see 56 & 57 Vict. c. 73, s. 17.)
Education Authority. 8 & 9 Geo. 5, c. 39, s. 43.	Orders, certificates, requirements, and documents of a local Education Authority.	Signature by the Clerk of the Authority, or of the Education Committee, or the director of or secretary for education.

Enrolled Deeds.		
12 & 13 Vict. c. 109, ss. 17–19. Jud. Act (Officers), 1879, ss. 5, 12. 54 & 55 Vict. c. 67, s. 1, paragraph 7. Ord. LXI. rr. 1, 6–14. *Smartle* v. *Williams* (1694), 1 Salk. 280. *Giles* v. *Smith* (1834), 1 C. M. & R. 462. *Doe* v. *Lloyd* (1840), 1 M. & G. 671.	Due execution (see note (5), p. 244), contents, and enrolment of the deed, and any plan thereto annexed.	The original deed with a certificate, sealed or stamped with the proper seal of the Central Office, *or* a copy of the enrolment sealed or stamped with such seal, with plan or copy plan annexed thereto respectively. (And see Order LXI. r. 13, and "Public Records.")
Factories and Workshops.		
54 & 55 Vict. c. 75, s. 12.	The special rules for the time being for a factory or workshop, and that they are duly established.	A copy of the rules certified by the inspector.
1 Ed. 7, c. 22, s. 15.	Bye-laws of a District Council providing for means of escape from fire in case of any factory or workshop.	See "Public Bodies," *post* (7).
s. 129.	Any facts required by the Act of 1901 to be entered in the general register kept in a factory or workshop, when sought to be proved against the occupier.	The entry made by or on behalf of the occupier.
s. 147.	The age of a person found in a factory or workshop.	A declaration in writing by a certifying surgeon for the district that he has personally examined the person, and believes him or her to be under the age set forth in the declaration.
Fisheries.		
Salmon.		
28 & 29 Vict. c. 121, ss. 47, 53.	Orders of Commissioners made in pursuance of the Salmon Fishery Act, 1865, with accompanying plans and maps.	Copies of the orders, plans, or maps, stamped with the seal of the Commissioners.

Title, and Source.	Facts to be proved.	Mode of proof; and see page 221.
Fisheries—*continued.*		
Salmon—continued.		
Id., and 49 and 50 Vict. c. 39, s. 3. 52 & 53 Vict. c. 30, ss. 6 and 7, and 3 Ed. 7, c. 31.	Certificate or order of the Secretary of State made in pursuance of the Salmon Fishery Acts, 1861–1865.	Copy of the certificate or order stamped with the official stamp of the President of the Board of Agriculture and Fisheries, and signed by any person by his order.
Id. ss. 4, 5. 36 & 37 Vict. c. 71, ss. 6, 8.	Constitution, alteration, and combination of districts.	As above; also certificate of President, deposited with the Clerk of the Peace, now of the County Council.
s. 35.	Proceedings at a meeting of a Board of Conservators, and the regularity of the meeting.	A minute of the proceedings signed by the chairman of that or the next meeting.
Id. ss. 39, 42.	The existence and due making of bye-laws by a Board of Conservators. The fact that a bye-law was duly made and published.	Production of copy of bye-law authenticated by the seal of the Board. Production of a newspaper containing notice of making the bye-law.
s. 64.	A scale of licences approved by the President in pursuance of the Salmon Fishery Act, 1868, or this Act.	Production of copy certified by the President of the Board of Agriculture and Fisheries, as under the Documentary Evidence Act, 1868.
49 & 50 Vict. c. 39, s. 4 (3).	Contents of order, certificate, or other document issued by the Board of Agriculture and Fisheries under the Salmon and Fresh Water Fisheries Acts.	Copy certified by a secretary or assistant secretary of the Board, or an inspector, sealed by the Board, or signed by the above.
Fresh Water Fisheries. See 47 Vict. c. 11, s. 6.	"The Salmon and Fresh Water Fisheries Act are a good example of the confusion that is caused by legislation by reference."—Halsbury's "Laws of England:" Note to Art. 1314. There are better.	

Fisheries—*continued.* *Sea Fisheries.* 31 & 32 Vict. c. 45, s. 42. 3 Ed. 7, c. 31.	The fact that the limits of any oyster or mussel fishery have been duly buoyed or otherwise marked, or that notices of the limits have been duly published, posted, or distributed, or that notice of the provisions of the Order or Act relating to the fishery have been duly published.	A certificate of one of the secretaries or assistant secretaries of the Board of Agriculture and Fisheries.
Gas Companies. 10 & 11 Geo. 5, c. 28, s. 6 (3) and (4).	The liability of gas undertakers to forfeiture in respect of failure to comply with the provisions of this Act, or any order thereunder, as to the calorific value, purity, pressure, or composition of gas.	The report of a gas examiner, which is conclusive.
	The due making and signing of a decision of the chief gas examiner.	The decision of the chief gas examiner purporting to have been signed by him; but this is *primâ facie* evidence only.
Inclosure Awards, (i) Under Special Acts. 3 & 4 Will. 4, c. 87, s. 2. Cp. Jud. Act (Officers), 1879.	(i) Fact of award and all matters and facts enacted by or recited in it, and any map annexed to and enrolled with it.	(i) A copy or extract of or from the award enrolled, signed by the proper officer, namely, either by the clerk of the council (51 & 52 Vict. c. 41, s. 83), of the county wherein the lands are situate or his deputy, *or* by an officer of the High Court of Justice, according as the award was enrolled with the county records or in the court. (See also "Public Records")
(ii) By the Inclosure Commissioners, or their successors the Land Commissioners, and the Board of Agriculture and Fisheries. 8 & 9 Vict. c. 118 (s. 2) s. 146. (45 & 46 Vict. c. 38, s. 48.) (52 & 53 Vict. c. 30, s. 2.) 3 Ed. 7, c. 31.	(iii) The same.	(ii) A copy or extract, certified as a true copy or extract by the clerk of the council (51 & 52 Vict. c. 41, s. 83), of the county where the lands are situate, of or from the copy confirmed award deposited with him.

Title, and Source.	Facts to be proved.	Mode of proof; and see page 221.
Judicial Proceedings.		
(i) Of High Court of Justice. R. S. C. Ord. XXXVII. r. 4. Ord. LXI. rr. 7, 28, 29.	(i) (a) Writs, records, pleadings, and documents filed in the High Court of Justice (as to the documents so filed, see R. S. C.). *R.* v. *Scott* (1877), 2 Q. B. D. 415.	(i) (a) An office copy, sealed with the seal of the Central Office, of such writ or other document respectively, *or* the original writ or document produced by an officer of the court in pursuance of an order of a judge or master.
8 & 9 Vict. c. 113, s. 2 (*ante*, p. 72).	(b) The signature of decrees, orders, certificates, and other judicial and official documents by any judge of the Supreme Court.	(b) The original decree or other document so signed.
Jud. Act, 1873, s. 61.	(c) Writs and other documents issued out of or filed in any district registry.	(c) The original writ or other document, or an exemplification or copy thereof, sealed with the seal of such district registry.
(ii) Of County Courts. 51 & 52 Vict. c. 43, ss. 28, 180.	(ii) Plaints, summonses, orders, judgments, executions, and returns thereto, fines, and all other proceedings in or process issuing out of the court.	(ii) The original summons or other process issued out of the court, sealed or stamped with the seal of the court, *or* the registrar's minute-book from the office of the court, containing the entry of the plaint or other proceeding, *or* a copy of such entry bearing the seal of the court and signed and certified by the registrar as a true copy thereof.
(iii) Upon indictments. 14 & 15 Vict. c. 99, s. 13. *Richardson* v. *Willis* (1872), L. R. 8 Ex. 69. Cp. 28 & 29 Vict. c. 18, s. 6, 34 & 35 Vict. c. 112, s. 18, and 1 & 2 Geo. 5, c. 6, s. 14.	(iii) Trial and conviction or acquittal of any person charged with any indictable offence.	(iii) Copy of the record of the indictment, trial, conviction and judgment, or acquittal, as the case may be, omitting the formal parts thereof, certified under the hand of the clerk of the court or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer.

Judicial Proceedings—*contd.*		
(iv) Of Courts of Summary Jurisdiction.		
(a) 42 & 43 Vict. c. 49, s. 22,	(iv) (a) Of convictions and orders and other proceedings directed to be registered by rules; for the purpose of informing the Court of Summary Jurisdiction acting for the same place; and except to prove previous conviction of a person charged with another offence.	(iv) (a) The register of the court and any extract therefrom certified by the court,
(b) 34 & 35 Vict. c. 112, s. 18.	(b) A conviction	(b) A copy of the conviction signed by a justice having jurisdiction over the offence in respect of which the conviction was made, or the officer of the court by which the conviction was made, or to which the conviction was referred (*i.e.* the clerk of the peace, 11 & 12 Vict. c. 43, s. 14).
(v.) Of Foreign Courts and Courts in British Colonies. 14 & 15 Vict. c. 99, s. 7, (*ante*), p. 92).	(v) A judgment, decree, order, or other judicial proceeding, or an affidavit, pleading, or other legal document filed or deposited in court.	(v) An examined copy, or an authenticated copy sealed with the seal of the court, or, if there is no seal, signed by the judge or one of the judges of the court, with a statement that there is no seal.
(vi) Other cases, where no statutory provision.	(vi) (a) Any judicial proceedings therein.	(vi) (a) Semble the record; the materials from which the record would actually be made up; and examined and certified copies thereof.
(a) *Courts of Record:* *R.* v. *Smith* (1828), 8 B. & C. 341, *R.* v. *Yeoveley* (1838), 8 A. & E. 806 *R.* v. *Newman* (1852), 2 Den. C. C. 390.		
(b) *Courts not of Record:* *Dyson* v. *Wood* (1824), 3 B. & C. 449. *Dawson* v. *Gregory* (1845), 7 Q. B. 756. *Hartley* v. *Hindmarsh* (1866), L. R. 1 C. P. 553.	(b) Do. do.	(b) Such minute, if any, as is regularly kept in the court, verified by the proper officer of the court, *or* where no such minutes are kept, oral evidence of the proceedings.

PUBLIC DOCUMENTS.—*continued.*

Title, and Source.	Facts to be proved.	Mode of proof; and see page 221.
Land-Tax Assessment.		
38 Geo. 3, c. 5, ss. 4, 8, 15, 16. *R.* v. *King* (1788), 2 T. R. 234 *Doe* v. *Seaton* (1834), 2 A. & E. 171.	The assessment of any particular lands, and any facts duly entered therein, as *e.g.* the fact that the lands were occupied by the persons and at the times therein mentioned.	Examined or certified copy of entry in the duplicate assessments in the custody of the collectors of land tax, *or* in those in the custody of the Commissioners of Land Tax, within whose district or division the lands are situate. (See also "Public Records.")
Land Titles and Transfer.		
(i) 38 & 39 Vict. c. 65, s. 80, ss. 10, 29, as to freeholds; ss. 22, 40, as to charges.	Matters contained in a land certificate or certificate of charge.	The certificate, which is *primâ facie* evidence.
Id. ss. 16, 34, 104.	The contents of a registered lease.	The office copy thereof.
Id. s. 120.	The existence and contents of an instrument purporting to be sealed with the seal of a district registry.	The instrument or a copy thereof.
Licensing.		
10 Ed. 7, c. 24, s. 53,	Any of the matters required by the Licensing (Consolidation) Act, 1910, to be entered therein; viz. renewal s. 42, the premises licensed, their owners and the licensees, s. 50 (1); any conviction of the holder of the licence, for an offence committed by him as such, including adulteration of drink, s. 50 (2); forfeiture, disqualification of premises, and other matter relating to the licence, s. 50 (3); a condition as to early closing, s. 59; endorsement of a protection order, s. 88 (3); convictions for bribery, treating, etc., 46 & 47 Vict. c. 51, s. 38 (8), and 47 & 48 Vict. c. 70, s. 23.	A copy of an entry in the register made in compliance with this Act.

Marriage.		
(i) In Church of England before March 2, 1837. 70th Canon of 1603. *Doe* v. *Barnes* (1834), 1 Moo. & Rob. 386. *Re Hall's Estate* (1852), 22 L. J. Ch. 177.	(i) Fact and date of marriage in a parish church or chapel according to the rites of the Church of England before March 2, 1837, and names of parties married.	(i) Examined or certified copy of the entry of the marriage made by a minister of the parish in the register of marriages kept in the custody of a minister of the parish, *or* of the entry in the copy register transmitted to and kept in registry of the diocese. (See note (2), p. 243.)
(ii) In Church of England or according to rites of Quakers or Jews after March 1, 1837. 6 & 7 Will. 4, c. 86, ss. 31, 35, 37, 38.	(ii) Fact and date of marriage in a church or chapel of the Church of England, or according to the rites of the Quakers, or of the Jews, after March 1, 1837, and the name, age or nonage, condition, rank or profession, and residence of the parties; and the name and rank or profession of the father of each party.	(ii) Copy certified under the hand of the parson, or in the case of Quakers or Jews of the registering office or secretary respectively, of the entry of the marriage in the marriage register-book in his keeping, *or* a certified copy sealed or stamped with the seal of the general register office of the entry of the marriage in the certified copy register-books kept in that office (*i.e.* those transmitted by the superintendent registrars).
(iii) In Dissenting Chapel or Registry. 6 & 7 Will. 4, c. 85, ss. 18, 20, 21, 23, 24, 44. 61 & 62 Vict. c. 58, ss. 4, 7, 11.	(iii) The same facts as last above-mentioned in respect of marriages in buildings certified as places of religious worship and registered for the solemnisation of marriages (as *e.g.* marriages in dissenting churches and chapels) and marriages celebrated in the office of a superintendent registrar.	(iii) Copy certified under the hand of the registrar [*or* authorised person under the Marriage Act, 1898] of the entry in the marriage register-book in his keeping, *or* certified copy sealed or stamped with the seal of the general register office of the entry in the certified copy register-book kept in that office (*i.e.* those transmitted by the superintendent registrars).
Medical Registers, &c.		
(i) Apothecaries. 55 Geo. 3, c. 194, s. 21. 14 & 15 Vict. c. 99, s. 8.	(i) The fact of a person's qualification to practise and sue for charges as an apothecary.	(i) Certificate of the qualification as an apothecary under the common seal of the Society of the Art and Mystery of Apothecaries of the City of London.
(ii) Chemists and Druggists and Pharmaceutical Chemists. 31 & 32 Vict. c. 121, s. 13.	(ii) The fact of a person's registration or non-registration as a qualified chemist and druggist or pharmaceutical chemist.	(ii) A copy of the "Registers of Pharmaceutical Chemists and Chemists and Druggists," printed and published in pursuance of the Act, *or* a certificate under the hand of the registrar, countersigned by the president and two members of the council of the Pharmaceutical Society.

Title, and Source.	Facts to be proved.	Mode of proof; and see p. 221.
Medical Registers, &c.—*continued.* (iii) Dentists. 41 & 42 Vict. c. 33, ss. 5, 29. (iv) Medical Practitioners. 21 & 22 Vict. c. 90, ss. 15, 27, 32. (v) Veterinary Surgeons. 44 & 45 Vict. c. 62, ss. 9, 17	(iii) (iv) (v) The fact of a person's registration or non-registration as qualified to practise and sue for charges as a dentist, medical practitioner, or veterinary surgeon respectively.	(iii) (iv) (v) A copy of the register of dentists, medical register, or register of veterinary surgeons respectively, printed and published in pursuance of the Act relating thereto respectively, or, in case of erroneous omission from any such register, a certificate of the registrar, &c.
Mercantile Marine. 57 & 58 Vict. c. 60, ss. 11, 64, 695.	(i) (a) Name of ship and port to which she belongs; (b) the details comprised in the surveyor's certificate; (c) particulars respecting her origin stated in declaration of ownership; (d) name and description of her registered owner or owners, and if more than one the proportions in which they are interested in her.	(i) *Semble*, the original register-book produced from custody of registrar or other person having the lawful custody thereof, *or* the register kept by the Registrar-General of Shipping or Seamen, *or* in case of (b) and (c) the original certificate of registry signed by the registrar or other proper officer, and the original declaration respectively, or examined or certified copy thereof.
Id. ss. 64 (2) (b) (c), 695.	(ii) The registration of a ship, and the contents of the certificate of registry, and any endorsement thereon.	(ii) The certificate of registry signed by the registrar or other proper officer, and the endorsement thereon similarly signed, *or* an examined copy thereof, or a copy certified as a true copy by the officer to whose custody the original was entrusted.
Id. ss. 64 (d), 695.	(iii) A declaration made in pursuance of Part I. of the Act in respect of a British ship, and the matters stated therein.	(iii) The declaration itself, *or* an examined or certified copy as last mentioned.

Id. ss. 100, 695.	(iv) Certificate of competency of officer, and all matters duly stated therein, and the record of such certificates, and of the suspending, cancelling or altering of the same kept by the Registrar-General of shipping and seaman, or other person directed to keep it, and all matters duly stated therein.	(iv) The original certificate or record respectively, *or* a copy signed or certified by such Registrar-General or person, or an examined copy.
Id. ss. 229, 695.	(v) Desertion from a ship in a port abroad.	(v) A certified copy of an entry of desertion in a log-book, *or* an examined or certified copy as above.
Id. ss. 239–243, 256, 695, 715.	(vi) Matters duly stated in an official log-book.	(vi) The official log-book, *or* a copy thereof (or extract therefrom) signed and certified by the superintendent or other officer having custody thereof, *or* an examined copy thereof.
Id. ss. 256, 695.	(viii) Matters duly stated in documents delivered or transmitted to, or retained by a superintendent or officer of customs in pursuance of the Act.	(viii) The original documents, *or* examined or certified copies as above.
Id. ss. 334, 695.	(ix) Expenses incurred by, or by authority of, a Secretary of State, Governor of a British possession or consular officer, in respect of a wrecked passenger, or forwarding a passenger to his destination.	(ix) A certificate by the Secretary of State, Governor or Consular Officer, *or* an examined or certified copy thereof.
Id. ss. 695, 719, 770.	(x) Matters duly stated in documents made, issued or written by, or under the direction of the Board of Trade, and sealed with their seal, or signed by their secretary or assistant secretary, or, if a certificate, by the Marine Department.	(x) The original document *or* a copy signed or certified as above.
Mines (Metalliferous). 35 & 36 Vict. c. 77, s. 30.	Special rules established under this Act in any metalliferous mine; and the facts that they are duly established and have been signed by the inspector.	A copy certified by the inspector.

Title, and Source.	Facts to be proved.	Mode of Proof; and see p. 221.
Naturalization.		
4 & 5 Geo. 5, c. 17, s. 20.	A declaration made under this Act, or any Act repealed by this Act, and that the person therein named as declarant made the declaration at the date mentioned.	Production of the original declaration, or of any copy thereof certified to be a true copy by the Secretary of State, or by any person authorised by him.
Id. s. 21.	A certificate of naturalization.	Production of the original certificate or copy as above.
Id. s. 22.	Entries in a register made in pursuance of this Act, or of any Act thereby repealed, and any matters by this Act or by any Act thereby repealed, or by any regulation of the Secretary of State, authorised to be inserted in the register.	Such copies certified in such manner as may be directed by the Secretary of State.
Newspapers.		
44 & 45 Vict. c. 60, ss. 8, 9, 15.	The registration of a newspaper, its title, and the names, occupations, places of business, and residence of all its proprietors.	A copy of an entry in or extract from the register of the newspaper proprietors, in the principal office of the registrar of Joint Stock Companies, certified by the registrar, or his deputy, or under the official seal of the registrar.
Parliament.		
See Art. 81, *ante*, p. 88.		
Patents of Invention and Designs.		
(i) Patents.		
7 Edw. 7, c. 29, ss. 28, 78, 79.	(a) Matters directed or authorised to be inserted in the register of patents, *e.g.* names and addresses of grantees of patents, notifications of assignments and of transmissions of patents, of licences under patents, and of amendments, extensions and revocations of patents, and such other matters affecting the validity of proprietor-	(a) The register *or* a certificate *or* copy of extract as mentioned below.

Id. s. 78.	ship of patents as may be prescribed.	
	(b) That any entry which the Comptroller is authorised by the Act to make, was made, and the contents of the entry; and that any matter or thing that he is authorised to do has been done or left undone.	(b) A certificate purporting to be under the hand of the Comptroller.
s. 79.	(c) The existence and contents of patents, specifications, and other documents in the Patent Office, and registers and other books kept there, or extracts therefrom.	(c) Printed or written copies or extracts, purporting to be certified by the Comptroller, and sealed with the seal of the Patent Office.
(ii) Designs. *Id.* ss. 52, 51, 78, 79.	Any matter directed or authorised by this Act to be entered in the register of designs, *e.g.* names and addresses of proprietors of registered designs, notifications of assignments and of transmissions of registered designs; or such other matters as may be described.	The register of designs, or a certificate of registration or copy in case of loss, or a copy of or extract as above.
Public Bodies. (i) Boards of Guardians or District Boards. 5 & 6 Vict. c. 57, s. 17. 7 & 8 Vict. c. 101, s. 69. 11 & 12 Vict. c. 110, s. 11.	(i) (a) The making of an order or the preferring of a complaint, claim, or application, or the giving of any authority by any such board.	(i) (a) Copy of the minute of any such order, complaint, &c., or of the resolution to make the same, signed by the presiding chairman of the board, and sealed with their seal and countersigned by their clerk or person acting as their clerk.
	(b) The fact and date of the chargeability of a particular pauper to a particular parish.	(b) Certificate signed, sealed, and countersigned as aforesaid, that the pauper has so become chargeable: made within twenty-one days of order sought for.
(ii) Borough and County Councils. 45 & 46 Vict. c. 50, ss. 22, 24. 51 & 52 Vict. c. 41, s. 75. *Robinson* v. *Gregory*, [1905], 1 K. B. 524.	(ii) (a) Proceedings at any meeting of the council or of any committee thereof.	(ii) (a) Minute of such proceedings signed at the same or the next ensuing meeting by the mayor or chairman, as the case may be, of such council or by a member of the council or of the committee, as the case may be, describing himself as or appearing to be chairman of the meeting at which the minute is signed.

Title, and Source.	Facts to be proved.	Mode of proof; and see page 221.
Public Bodies—*contd.*	(b) Existence and due making of a bye-law of any such council.	(b) A written copy of the bye-law authenticated by the corporate seal of the council.
(i) Corporations. *R.* v. *Mothersell* (1718), 1 Str. 92. *R.* v. *Fraternity of Hostmen of N.* (1745), 2 Str. 1221, and cases there cited.	(iii) Bye-laws and minute-books of corporation and any facts duly entered in such books.	(iii) *Semble*, in the absence of express statutory provision, verified original, *or* examined copy of or extract from, bye-laws or minute-books respectively, duly entered and authenticated.
(iii) Urban District Councils (not being Borough Councils) and Rural District Councils, 38 & 39 Vict. c. 55, ss. 186, 199, and Sched. I., r. 10; 56 & 57 Vict. c. 73, ss. 21, 59.	(iv) (a) Existence and due making and confirmation of a bye-law of the authority. (b) The fact of the holding of a meeting of the local authority and of the proceedings thereat, and that such meeting and proceedings were regular.	(iv) (a) A copy of the bye-law signed and certified by the clerk to be a true copy and to have been duly confirmed. (b) A minute of such meeting and proceedings or a copy of any order or resolution made or passed thereat, signed by the chairman of the meeting at which the proceedings took place or of the next ensuing meeting.
(vii) Manor Courts. *Doe* v. *Hall* (1812), 16 East, 208. *Doe* v. *Mee* (1883), 4 B. & Ad. 617.	(v) The court rolls of the manor and all facts duly entered therein.	(v) Verified original *or* examined copy of or extract from court rolls.
(iv) Parish Councils and Meetings. 56 & 57 Vict, c. 73, ss. 2, 3; Sched. I., Part 3 (1) and (2).	(vi) The proceedings of a parish council or of a committee thereof or of a parish meeting.	(vi) A minute of the proceedings of such council or meeting signed at the same or the next ensuing meeting by a person describing himself as or appearing to be chairman of the meeting at which the minute is signed.
(vi) Vestries. *R.* v. *Martin* (1809), 2 Camp. 100. *Hartley* v. *Cook* (1832), 5 C. & P. 441.	(viii) The proceedings of the vestry.	(viii) Verified original *or* examined copies of or extracts from the minute-books of the vestry, duly entered by the proper officer. (As to custody, see now 56 & 57 Vict. c. 73, s. 17.)

Public Records. 1 & 2 Vict. c. 94, ss. 12, 13 (*ante*, p. 85).	Contents of public records (for the various documents comprised under this title, and the ages at which they are transferred to the Record Office, see Scargill Bird's Guide to the Public Records and the annual reports of the Deputy-Keeper of the Public Records).	A copy examined and certified as a true and authentic copy by the Deputy-Keeper of the Records or by an assistant Record-Keeper, and sealed or stamped with the seal of the Record Office.
Ships, British. See Mercantile Marine.		
Solicitors and Conveyancers. 23 & 24 Vict. c. 127, s. 22.	The fact that a person is or is not qualified to practise as a solicitor or conveyancer.	A copy of the Law List published in pursuance of the Act; provided that, if a person's name does not appear in the list, his qualification as a solicitor may be proved by an extract from the roll of solicitors, certified under the hand of the secretary of the Incorporated Law Society or of the registrar for the time being.
State, Acts of. See Art. 83, *ante*, p. 89.		
Succession. 20 & 21 Vict. c. 77. (i) To Personalty. ss. 22, 29, 46, 52, 69, and see forms in App. 2 to Probate Court Rules.	(i) (a) Disposition by will of personalty (whether including realty or not). (b) Succession to personalty upon intestacy. (c) Disposition by will of personalty (whether including realty or not) of which administration is granted with the will annexed.	(i) (a) The probate of the will, *or* an exemplification of the grant of the probate, *or* an official copy of the will. (b) Letters of administration, *or* an exemplification thereof, *or* an official certificate of the grant of such letters. (c) Letters of administration with copy will annexed, *or* an exemplification thereof, *or* an official copy of the grant of such letters with will annexed.

PUBLIC DOCUMENTS—*continued.*

Title, and Source.	Facts to be proved.	Mode of proof; and see page 221.
Succession—*contd.* 20 & 21 Vict. c. 77. (ii) To realty. s. 64.	(ii) Disposition of realty by a will which also disposes of personalty.	(ii) The probate of the will or letters of administration with copy will annexed, *or* an official copy of same respectively, after proof by the party adducing it that he gave his opponent notice in writing ten days before the trial of his intention to give such document in evidence in proof of such disposition, unless his opponent within four days of the receipt thereof has served on him a counter-notice that he disputes the validity of such disposition. (See note (6).)
60 & 61 Vict. c. 65, s. 1. (iii) To real estate under.	As in (i) substituting real estate for personalty, in cases of realty of persons dying after 31st Dec., 1897.	(iii) *Semble*, as in (i).

NOTES TO APPENDIX OF PUBLIC DOCUMENTS.

1. *Baptisms.*—It seems that an entry in the register of the date or place of birth is not admissible: *Wihen* v. *Law*, 1821, 3 St. 63; *R.* v. *N. Petherton*, 1826, 5 B. & C. 508; *R.* v. *Clapham*, 1829, 4 C. & P. 29; and *Burghart* v. *Angerstein*, 1834, 6 C. & P. 690. The same seems now to be the case when the question of legitimacy is in issue: *Robinson* v. *Buccleuch*, 1887, 3 Times L. R. 472; but see the earlier cases of *Cope* v. *Cope*, 1833, 1 M. & R. 269; *Morris* v. *Davies* therein cited; and *Re Turner, Glenister* v. *Harding*, 1885, 29 Ch. D. 985.

2. *Registers in Registry of Diocese.*—It is not clear whether the official copy of the parish register (whether of baptisms, marriages, or burials) deposited in the registry is to be deemed an original public document so as to render it or copies of it admissible without proof of loss or destruction of the original parish register: *Walker* v. *Beauchamp*, 1834, 6 C. & P. 552.

3. *Births.*—It was held in *R.* v. *Wintle*, 1870, 9 Eq. 373, that the register of births was not evidence of the date, only of the fact, of the birth. This seems erroneous: see per

Erle, J., in *Doe* v. *Andrews*, 1850, 15 Q. B. 756, at p. 759, and the scheduled form of entry in the register.

The entry is only evidence of the place of birth when this fact is entered by the express order of the Registrar-General: see 7 Will. IV. & 1 Vict. c. 22, s. 8.

4. *Certificate of Clerk to Charity.*—If the copy is certified by the chief clerk, the absence of the secretary, which is a condition precedent to his so certifying, will be presumed: *Baker* v. *Cave*, 1857, 1 H. & N. 674.

5. *Tithe Apportionment.*—In *Wilberforce* v. *Hearfield* it was held that a tithe-map was not evidence of boundaries. But *quære* whether the same considerations do not apply here as in the case of land tax assessments.

6. *Enrolments.*—It is not clear that the prescribed proof of enrolment covers also the due execution of the deed; but the balance of authority seems in favour of that view.

7. *Will of Realty.*—Where no such notice is given, and in all cases where the will relates to realty alone, it must be proved by or through the attesting witnesses.

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